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Deciphering the Art of Appropriation: A Holistic Perception

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February 2020
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Abstract

This dissertation was written as part of the MA in Art, Law and Arts Management at the International Hellenic University. It is a fact that during the last years there is a dramatic dissemination of contemporary art cutting across the conventional art forms. As long as the controversial issue of contemporary art and the inextricable widespread of Appropriation Art has already occupied many eminent intellectuals and brilliant scholars of the 20th century, I was really excited and deeply curious to study this topic in depth. Under that prism, my primary orientation was to focus on the fertile combination of the historical positions, theories and practices, aiming to feature the basic aspects and circumstances that govern the genre of “appropriation art”, setting chronologically its evolution, connecting it with theories of philosophical aesthetics and art market terms. My secondary goal was to underline the interconnection of appropriation practices with the implementation of Intellectual property issues, especially under the Copyright Law.

In order to fulfill substantially the purpose of my paper, I intend to present comprehensively a series of fussily selected appropriation art material, hoping to introduce the readers into the core of Appropriation Art, emphasizing on practices from the real art world. Additionally, the construction of the paper’s legal pillar requires the elaboration of the legal instruments that provide the lawful “vehicle” for the use of copyright protected works, mounting from the International Law, to Regional and National Law. Apart from the theoretical basis, I will try to demonstrate contiguous case law, in order to illuminate the applied rules according to Copyright Law. My primary objective is related to the presentation of a holistic perception of Appropriation Art, following basically the qualitative method with an emphasis on the case study, embellishing with the individual observation and participatory experience.

For the completion of this work, I would like to sincerely thank my supervisor, Dr. Irini Stamatoudi, for her constructive advice and valuable support.

Keywords: contemporary art, appropriation art, copyright law, fair use, legal challenges.

Marietta Spyrouli
08.02.2020

Preface

Deciphering the Art of Appropriation from different strands was always an intrinsic need gathering both academic and practical knowledge. Actually, over the last decade, after having been closely affiliated with the field of visual arts in general and more specifically with the contemporary art and its provocative practices, I elaborated a deep interest in this controversial genre of artistic expression. My love for the arts was absolutely my basic motivation for the choice of the relevant topic and I have to recognize that both my interest and passion for arts were gradually incorporated in the study of contemporary art and were finally formed with numerous frequent visits at miscellaneous art exhibitions in Greece and also abroad. The aforementioned experiential procedure was realized with the determinant impact of systematic visits in art galleries, especially in major European cultural organizations displaying more and more artworks based on the challenging appropriation practice. Under those circumstances, I became deeply aware, familiar and immersive in this “new” artistic form, educating myself through the exploration of that “sui generis” artistic genre.

In other words, my personal engagement with the arts as part of an audience and art lover, was the driving force to address the above hot issue. I hope that this paper will establish a dialogue between Law and Art criticism, given that Appropriation Art is frequently framed for illegal and unethical ways displaying its creations. It is substantial to make clear that Appropriation Art has to follow particular rules in order to play its part as an autonomous and legitimate genre in the artworld. There are limits in every artistic expression which must be respected according to the Intellectual Property rules. This paper intends to clarify the complicated concept of Appropriation Art in the art world, highlighting its correlation with the Copyright Law. I would like to express my satisfaction growing out of the overall research around this subject, which undoubtedly enriched my knowledge in an advanced level and equipped me with the valuable tools in order to meet responsibly and professionally an upcoming engagement with the real art market.

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I. INTRODUCTION

It's a fact that nowadays, Contemporary art^{1,2} prevails in the current artistic field, opening a new horizon to the way people perceived and appreciated Art in the past. Contemporary art^{3,4} is basically related to the "new", the "avant-garde", the "pioneering" which keeps up with the needs of our present day. Due to the digital era and the flowing spread of information through media, the audience receives rapidly the messages of contemporary art practices and communicates decisively the new artistic tendencies. Retracing to the analysis of Professor of Art History Jean Robertson⁵, globalization in the arts, as it flourished during the 21st century comprises the primary component that pushed the boundaries of the challenging form of contemporary art. Furthermore, according to the well-known art curator David Elliott:⁶ *"We are con-*

¹ "Contemporary Art - Art Term", Tate, [online] Available at: <https://www.tate.org.uk/art/art-terms/c/contemporary-art> [Accessed 02 Oct. 2019].

"The term contemporary art is loosely used to refer to art of the present day and of the relatively recent past, of an innovatory or avant-garde nature".

² Terry Smith, "Contemporary Art", Oxford Bibliographies, [last reviewed 10 May 2017], [online] Available at: <https://www.oxfordbibliographies.com/view/document/obo-9780199920105/obo-9780199920105-0007.xml> [Accessed 02 Oct. 2019].

³ Kelly Richman-Abdou, "What is Contemporary Art? An In-Depth Look at the Modern-Day Movement", My Modern Met, 11 August 2019. [online] Available at: <https://mymodernmet.com/what-is-contemporary-art-definition/> [Accessed 04 Oct. 2019] "In its most basic sense, the term contemporary art refers to art-namely, painting, sculpture, photography, installation, performance, and video art-produced today".

"Given its "art of today" definition, you may be surprised to hear that contemporary art actually has a relatively long history..."

⁴ FMK, "Interview with Terry Smith", International Conference "Beyond the Crisis in the Humanities: Transdisciplinary Transformations of Contemporary Discourses on Art and Culture", Faculty of Media and Communications, Belgrade, Serbia, Published on 14 May 2015, YouTube video, 6:17.[online], <https://www.youtube.com/watch?v=jf6s9JPft8E> [Accessed 01 Nov. 2019].

⁵ Jean Robertson, "Art in the 21st Century", Khan Academy. [online] *"Art of the 21st century emerges from a vast variety of materials and means. These include the latest electronic technologies, such as digital imaging and the internet..." "A key feature of the art scene in the 21st century (and of many sectors of 21st-century life) is the impact of globalization – the accelerating interconnectivity of human activity and information across time and space. Aided by the internet and mass media, awareness of the vitality of contemporary art in localities around the globe has grown exponentially."* Available at: <https://www.khanacademy.org/humanities/global-culture/beginners-guide-contemporary-art1/a/art-in-the-21st-century> [Accessed 03 Oct. 2019].

⁶ "David Elliott: Ocula". Ocula. Discover the Best of Contemporary Art Now, 02 April 2013, [online] Available at: <https://ocula.com/magazine/conversations/david-elliott/>

cerned with the relationship between art and life. Contemporary art is only intelligible in terms of its relationship to our life”⁷

It is obvious that experts, theorists and professionals from the art world, recognize the value of contemporary art connecting this kind of art with the “core” of our real life, interpreting it as an objective way that people configure their way of expression and living in general. As far as contemporary art includes many vibrant aspects of creation which encompasses usually provocative and eccentric ideas, it epitomizes literally what occurs right now, reflecting the world at the modern day.^{8, 9, 10} Defining the broader concept of contemporary art it is a prerequisite for understanding the concept of Appropriation Art, an artistic method that has sparked many complex issues regarding aesthetics, legal controversies and ethical considerations. These subject mat-

⁷ David Elliot Quotes, Brainy Quote. [online] Available at: <https://www.brainyquote.com/authors/david-elliott-quotes> [Accessed 01 Nov. 2019].

⁸ Terry Smith, “The State of Art History: Contemporary Art.” *The Art Bulletin* 92, no. 4 (2010): 369-370. [online] Available at: <https://www.jstor.org/stable/29546137> [Accessed 11 Nov. 2019]; Terry Smith, “Art to Come: Histories of Contemporary Art” (Duke University Press, 2019), 245-278. “The word “contemporary” is commonly used in most languages to refer to the passing present...” “...Current editions of the Oxford English Dictionary give four major meanings. They are all relational, turning on prepositions, on being placed “to,” “from,” “at,” or “during” time. There is the strong sense of “Belonging to the same time, age, or period” (i.a.); the coincidental, but also entangled sense of “Having existed or lived from the same date, equal in age, coeval” (2); and the mostly adventitious “Occurring at the same moment of time, or during the same period; occupying the same definite period, contemporaneous, simultaneous” (3). Each of these three meanings comprehends a distinctive sense of presentness, of being in the present, of beings that are present to each other and to the time that they happen to be in while also being aware that they can be in no other. The Oxford English Dictionary’s fourth definition of “contemporary” brings these radically diverse conjunctions of persons, things, ideas, and time together and heads them in one direction: “Modern; of or characteristic of the present period; especially up-to-date, ultra-modern; specifically designating art of a markedly avant-garde quality, or furniture, building, decoration, etc. having modern characteristics.” “..When we pair the two sets of definitions (modern and contemporary), however, another interpretation insinuates itself: the contemporary has not only reached parity with the modern, it has eclipsed it”.

⁹ “Contemporary art - a primer”, Phaidon, [online] Available at: <https://de.phaidon.com/agenda/art/picture-galleries/2011/october/21/contemporary-art-a-primer/> [Accessed 01 Nov. 2019].

The contemporary art expert Craig Garrett analyzes that: “*The term ‘modern art’ originally just meant art of the present era. Eventually the modern period was nailed down to a particular time - roughly the early 19th century to the late 20th century - and the word ‘modernism’ came to designate the artistic concerns of that era. As a consequence, people took up the term ‘contemporary art’ to say ‘the art of today’ without claiming the same ideologies and approaches as modern art. “...To confuse matters, not everyone means the same thing when they talk about contemporary art. Some museums and auction houses act like it begins with Warhol. For many art historians, it emerged in the 1960s and early 1970s, when movements like Conceptual art attacked the foundations of modern art. Wikipedia says contemporary art starts with the end of the Second World War. Meanwhile everyone still uses the term to mean any art being made right now.”*

¹⁰ Daniel Birnbaum, Cornelia H. Butler, Suzanne Cotter, *Defining Contemporary Art: 25 Years in 200 Pivotal Artworks* (Phaidon, 2011).

ters motivated me to occupy with the composing features of appropriation art, pointing to examples from the real art world.¹¹

In the first chapter it is substantial to initiate the perspective reader into a rigorous terminological analysis of the concept of Appropriation Art, flashing back to its roots via the history of Art. My orientation will be primarily on the visual arts, illustrating certain examples from the field of painting, photography and installations, while at the same time a fertile dialogue of critical theories will be established. That chapter will be completed with a brief analysis of the beneficial parameters of Appropriation Art in economic growth and cultural progress. In the second level, I will approach the notion of correlation between Appropriation Art and Copyright Law, enriching it with the basic supportive legal instruments. The third level dedicates a comprehensive analysis in landmark copyright law cases providing the reader with a deeply practical and substantial understanding of Copyright Law in the field of Art.

¹¹ "Reconsidering Appropriation", Manual No. 4, Kunstmuseum Basel, 29 August 2015 - 24 January 2016, [online] Available at: https://kunstmuseumbasel.ch/de/file/2288/f4b1c0c0/manual04_von_bildern_2015.pdf [Accessed 01 Nov. 2019].

II. DECODING APPROPRIATION ART

This chapter reconciles the reader with the etymology of Appropriation Art, detecting its fundamental origin based on historical resources and chronological references. At a second level, the basic idea relies on the interconnection of Appropriation Art with the representative artists, presenting certain examples of relative works that will immerse the reader to the core of that practice. At the third level, a concise reference to influential, fundamental philosophical and the aesthetical theories is articulated, highlighting their impact on artists who adopted appropriation as an artistic method. That chapter, concludes with an analysis of the tremendous effect of appropriation art as a “mainspring” for financial growth and investment in the art market.

2.1. Appropriation Art: A Theoretical Analysis

“Every exploration is an appropriation”. Roland Barthes¹²

Etymologically speaking, “appropriating” is defined the act of owning something or presenting that someone possesses something. In the field of Art, the phenomenon of appropriation refers explicitly to the practice of borrowing pre-existing elements (e.g. images, films, photographs) from popular culture, mass media or other artists and re-using them after transformation into new works.^{13, 14} According to some scholars, the

¹² Roland Barthes, *The Eiffel Tower and Other Mythologies* (trans. Richard Howard), (Los Angeles: University of California Press, 1997), 14.

¹³ History of Art: Dictionary of Art & Artist, “Appropriation Art”, [online] Available at: http://www.all-art.org/artists-a-appropriation_art.html [Accessed 01 Nov. 2019].

“In the visual arts, to appropriate means to adopt, borrow, recycle or sample aspects (or the entire form) of man-made visual culture. Strategies include “re-vision, re-evaluation, variation, version, interpretation, imitation, proximation, supplement, increment, improvisation, prequel...pastiche, paraphrase, parody, forgery, homage, mimicry, travesty, shan-zhai, echo, allusion, intertextuality and karaoke.” The term appropriation refers to the use of borrowed elements in the creation of a new work (as in ‘the artist uses appropriation’) or refers to the new work itself (as in ‘this is a piece of appropriation art’). Art practices involve the ‘appropriation’ of ideas, symbols, artefacts, image, sound, objects, forms or styles from other cultures, from art history, from popular culture or other aspects of man made visual or non visual culture. Inherent in the process of appropriation is the fact that the new work recontextualizes whatever it borrows to create the new work. In most cases the original ‘thing’ remains accessible as the original, without change”.

¹⁴ “Appropriation”. Artspace. [online] Available at: <https://www.artspace.com/tags/appropriation> [Accessed 01 Nov. 2019].

“In an art context, appropriation refers to the use of pre-existing or previously defined images or objects, without significant changes in the concept or physical form”.

configuration of appropriation “rules” is usually based on the idea of “*slanting the allusion*”,¹⁵ justifying this kind of “stealing” with the claim of acting in the interest of Art.

It is generally accepted that “Appropriation Art” incarnates many diverse options and according to the circumstances and its contextually form, it is construed differently.¹⁶ The initial step of this survey is directed to the academic terminology of that strange practice. According to the definition of Oxford English Dictionary “*appropriation is the act of taking to oneself at one’s own property or for one’s own use, especially without permission*”.¹⁷ An equivalent definition derives also from the American Heritage College Dictionary, which recognizes as appropriation “*the act of appropriating, namely taking possession of or making use of exclusively for oneself, often without permission*”.¹⁸ Therefore, appropriation in its blunt interpretation, due to the lack of permission, implies a covert violation that penetrates the private property.¹⁹

In the field of Art, appropriation incorporates a specific functional definition which is based on certain practices and rules. According to the academic definition of the American Heritage College Dictionary:²⁰ “*Appropriation Art is the reworking of the images or styles contained in works of art, photographs etc., especially well-known ones, in order to encourage critical reinterpretation*”. In artistic terms appropriation includes diverse innovative techniques adopting materials, images and objects already existed in a new artwork without effecting evident alterations to the originals or making little transformation of the original.^{20, 21} A more recent approach of Appropriation

¹⁵ William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law*, (Harvard University Press, 2003), 260-261.

¹⁶ Justin Clemens and Pettman Dominic, *Avoiding the Subject: Media, Culture and the Object*. Amsterdam: Amsterdam University Press, (2004), 25-26. [online] Available at: <https://www.jstor.org/stable/j.ctt46n1c6> [Accessed 29 Nov. 2019].

¹⁷ Michael Kelly, *Encyclopedia of Aesthetics*, s.v. “Appropriation” (Oxford University Press, 1998); Ian Chilvers, *The Oxford Dictionary of Art and Artists*, s.v. “Appropriation” (Oxford University Press, 2009); “Appropriation: Meaning in the Cambridge English Dictionary.” Cambridge Dictionary. [online] Available at: <https://dictionary.cambridge.org/dictionary/english/appropriation>; *Shorter Oxford English Dictionary*, s.v. “Appropriation” (Oxford: Oxford University Press, 2007), 107;

¹⁸ Mifflin Houghton, *The American Heritage College Dictionary*, s.v. “Appropriation” (Boston: Houghton Mifflin, 2002), 70.

¹⁹ supra note 17.

²⁰ Houghton supra note 18, at 107; see also: Tate. “Appropriation - Art Term”. Tate. “Appropriation in art and art history refers to the practice of artists using pre-existing objects or images in their art with little transformation of the original”. [online] Available at: <https://www.tate.org.uk/art/art-terms/a/appropriation>. [Accessed 01 Nov. 2019].

²¹ For further definitions see: “MoMA learning”, Moma [online] Available at: https://www.moma.org/learn/moma_learning/themes/popart/appropriation/;

Art is being delivered by the author of one of the worldwide known art editions, who, practically, argues that appropriation practice applies a set of objects, images and texts detached from their artistic concept and grounded directly to a new one, furnished with a new meaning²². As I'm going to argue afterwards the basic objective of appropriation process refers to the re-contextualization of the new artwork, recoding the work from which it drew on elements and posing simultaneously a completely "fresh" narration.

2.2. Evolution of Appropriation Art and Typifications

The advent of Appropriation Art²³ and its establishment as an artistic practice matured gradually, deploying different means and ways of expression each time. In fact, appropriation methodology comprises a component of the wide notion of Modernism movement which dominated during the late 19th and early 20th century.^{24, 25} Flashing back to the history of art, appropriation "strategy" is being tracked down to the early twentieth century where leading Cubist^{26, 27} artists experimented with different mate-

"What is Appropriation?" (Article) Khan Academy [online] Available at: <https://www.khanacademy.org/humanities/global-culture/identity-body/identity-body-united-states/a/what-is-appropriation>; [Accessed 01 Nov. 2019]; "What is the difference between forgery and appropriation art?" Madeleine's Art (blog), [online] Available at: <https://madeinesartblog.wordpress.com/2017/06/10/what-is-the-difference-between-forgery-and-appropriation-art/> [Accessed 01 Nov. 2019].

²² Hans Werner Holzwarth, *Art Now*, Vol. 3 (Taschen, 2012), 304.

²³ "In The Wake of Richard Prince and Instagram, Revisiting Copyright Law, Appropriation and History", ASX, 04 June 2015, [online] Available at: <https://americansuburbx.com/2015/06/in-the-wake-of-richard-prince-and-instagram-revisiting-copyright-law-appropriation-and-history.html>, [Accessed 11 Nov. 2019].

²⁴ Timothy Anglin Burgard, Picasso and Appropriation. *Journal The Art Bulletin*, [online] Vol. 73, No. 3, (1991), 479-494, Available at: <https://www.jstor.org/stable/3045817?seq=1> [Accessed 11 Nov. 2019].

²⁵ Tate. "Modernism - Art Term", Tate. [online] Available at: <https://www.tate.org.uk/art/art-terms/m/modernism> [Accessed 05 Nov. 2019], "Modernism refers to a reforming movement in art, architecture, music, literature and the applied arts during the late 19th Century and early 20th Century"; see also: The Basics of Philosophy, "Modernism", [online] Available at: <https://www.philosophybasics.com/movements/modernism.html>, [Accessed 05 Nov. 2019]; Clement Greenberg, *The Collected Essays and Criticism*, Vol. 4: Modernism with a Vengeance, 1957-1969, University of Chicago Press (1995), 85. "According to Greenberg: *'The essence of Modernism lies, as I see it, in the use of characteristic methods of a discipline to criticize the discipline itself, not in order to subvert it but in order to entrench it more firmly in its area of competence. Modernism used art to call attention to art'*".

²⁶ Sabine Rewald, "Cubism", Met Museum, October 2004. [online] Available at: https://www.metmuseum.org/toah/hd/cube/hd_cube.htm [Accessed 05 Nov. 2019].

²⁷ Lauren Wallach, "A Cut-Down History of Collage", Art space, 15 Nov. 2002 [online] Available at: https://www.artspace.com/magazine/art_101/art_market/art_101_collage-5622 [Accessed 5 Nov. 2019]

rials in their works, as collages, newspapers, sheet music, magazines, fabrics and samples from wall papers²⁸ (Fig.1,2,3). As far as the question remains always modern, that paper aims to clarify and demonstrate - through distinctive examples - efficient ways to approach and understand the hybrid artistic form of appropriation^{29, 30} (Fig.4,5,6).



Figure 1: Pablo Picasso, *Glass and Bottle of Suze*, 1912, Charcoal, charcoal washes, gouaches, newsprint (Le Journal, 18 November 1912), printed paper, and colored drawing paper on white paper, 64.5 x 50 cm. Washington University Gallery of Art, St. Louis Daix 523. [online] Retrieved from: <http://www.artchive.com/artchive/p/picasso/suze.html#image> [Accessed 05 Nov. 2019].



Figure 2: Juan Gris, (1914), *Guitar and Glasses*, [Cut-and-pasted papers, gouache, and crayon on canvas, 36 1/8 x 25 1/2" (91.5 x 64.6 cm)], New York: Museum of Modern Art (MoMA), [on line] Retrieved from: <http://www.the-athenaeum.org/art/detail.php?ID=7794>, <https://www.moma.org/collection/works/80423> [Accessed 05 Nov. 2019].

²⁸ See examples of appropriation art in Cubism (Figures 1,2,3).

²⁹ See also: Appropriation Defined and Early Examples in Modern Art. Mark Penner- Howell Artwork. [online] Available at: http://www.markpennerhowell.com/?page_id=555 [Accessed 05 Nov. 2019], Fig. 4,5,6.

³⁰ "David Evans, Types of Appropriation in art", Artist Frog, 12 June 2019. [online] Available at: <https://artistfrog.com/david-evans-seven-types-of-appropriation-free-pdf-download/> [Accessed 05 Nov. 2019].



Figure 3: Georges Braque, (1918), *Bouteille et instruments de musique*, [crayon, charcoal and white chalk on collaged paper and corrugated cardboard 20 7/8 x 29 1/4 in. (53 x 75 cm.)], Christies Auction House. [online] Retrieved from: <https://www.christies.com/lotfinder/Lot/georges-braque-1882-1963-bouteille-et-instruments-3806645-details.aspx> [Accessed 05 Nov. 2019].



Figure 4: Andy Warhol, (1967), *Marilyn Monroe (Marilyn)*. [Portfolio of screenprints on paper, in 10 parts each 36 x 36 in. (91.4 x 91.4 cm.)], New York, Phillips Auction House. (Retrieved from: <https://www.phillips.com/detail/andy-warhol/NY010313/25>) [Accessed 05 Nov. 2019].



Figure 5: Marcel Duchamp, (1964), *In Advance of the Broken Arm*. [Wood and galvanized-iron snow shovel, 52" (132 cm) high], New York: The Museum of Modern Art (MoMA), (online) Retrieved from: https://www.moma.org/learn/moma_learning/marcel-duchamp-in-advance-of-the-broken-arm-august-1964-fourth-version-after-lost-original-of-november-1915/ [Accessed 05 Nov. 2019].



Figure 6: Sherrie Levine, (1996). *Fountain (Buddha)*. [Cast bronze, 12 x 15 7/8 x 18 in. (30.48 x 40.32 x 45.72 cm)], Los Angeles: The Broad, (online) Retrieved from: <https://www.thebroad.org/art/sherrie-levine/fountain-buddha> [Accessed 5 Nov. 2019].

Picasso was at the forefront of assimilating the “borrowing” technique, making direct use of the aforementioned eclectic materials.³¹, ³² Characteristically, in Picasso’s “*Les Femmes d’Alger*”, 1907 (MOMA, New York)³³ (Fig. 7), there are many similarities and affiliations with the African - Primitive Art.³⁴ According to Clement Greenberg, the most famous art critic of the second half of 20th century, “*The superior artist is the one who knows how to be influenced*”.³⁵ Under that consideration, a clear and direct inspiration from the eminent work of Diego Velasquez, “*Las Meninas*”, 1656³⁶ (Fig. 8) to the work of Picasso “*Las Meninas*”, 1957³⁷ (Fig. 9) can be easily identified.

³¹ supra note 25.

³² Andrew - Graham Dixon, *Art: The Definite Guide* (Dk Publishing Dorling Kindersley, 2008), 418-420.

³³ see Figure 7.

³⁴ Karl Ruhrberg, Manfred Schneckenburger, Christiane Fricke, and Klaus Honnef. “The Calm after the Storm, Cubism, or Classical Modern Art” in *Art of the 20th Century* (Taschen, 2012), 67-69.

³⁵ John Elderfield, James Leggio, Susan Weiley, *American Art of the 1960s* (The Museum of Modern Art, New York, 1991), 79.

³⁶ see Figure 8

³⁷ see Figure 9



Figure 7: Pablo Picasso, (1907), *Les Femmes d'Alger (O Version O)*, [Oil on canvas, 8' x 7' 8" (243.9 x 233.7 cm)], New York: The Museum of Modern Art (MoMA). (on line) Retrieved from: https://www.moma.org/learn/moma_learning/pablo-picasso-les-femmes-d-alger-o-version-o-paris-june-july-1907/ [Accessed 5 Nov. 2019].



Figure 8 (left): Velázquez, Diego Rodríguez de Silva y, (1656), *Las Meninas*. [Oil on canvas], Madrid: Museo del Prado (online) Retrieved from: <https://www.museodelprado.es/en/the-collection/art-work/las-meninas/9fdc7800-9ade-48b0-ab8b-edee94ea877f> [Accessed 5 Nov. 2019].



Figure 9 (right): Pablo Picasso, (1957). *Las Meninas*. [Oil on canvas, 194x260], Barcelona: The Picasso Museum. (online) Retrieved from: <https://www.pablopicasso.org/las-meninas.jsp>; <http://www.bcn.cat/museupicasso/en/collection/mpb70-433.html> [Accessed 5 Nov. 2019].

In that case, Picasso, after having adopted the “idea” of Velasquez’s work, created a completely revolutionary piece of art based on the cubic forms.³⁸, ³⁹ Georges Braque who was also a pervasive figure of Appropriation Art in the early 20’s, is widely recognized as the pioneer of collage practice, a fact that is being reflected in his major synthetic artwork “Fruit Dish and Glass, Sorgues, Autumn 1912, MET US)⁴⁰ (Fig. 10). Braque was also “inspired” by the characteristic Cezanne’s cubic forms remixing them in his works “Houses at L’ Esteque and “Le Portugais⁴¹ (Fig.11,12).

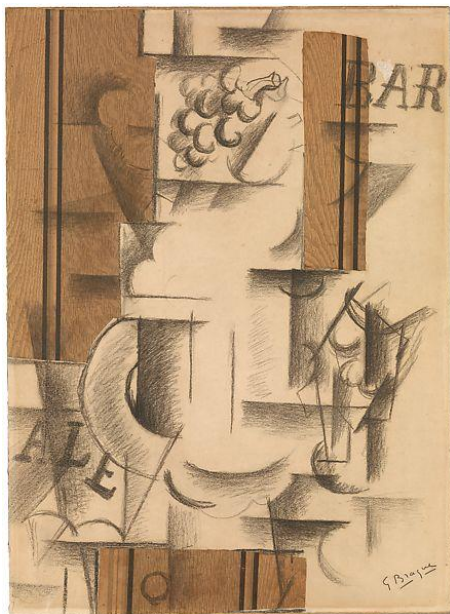


Figure 10: Georges Braque, (1912). *Fruit Dish and Glass*. [Charcoal and cut-and-pasted printed wallpaper with gouache on white laid paper; subsequently mounted on paperboard, 24 3/4 × 18 in. (62.9 × 45.7 cm)], New York: The Metropolitan Museum of Art (MET). (online) Retrieved from: <https://www.metmuseum.org/art/collection/search/490612>) [Accessed 05 Nov. 2019].

³⁸ John Finlay, “Picasso and Appropriation”, Word Press, [online], Available at: <https://pedroparicio.files.wordpress.com/2019/03/picasso-and-appropriation-by-john-finlay.pdf> [Accessed 7 Nov. 2019].

³⁹ Charles Harrison and Paul Wood, *Art in Theory 1900-2000: An Anthology of Changing Ideas* (Blackwell, 2009), 215-217.

⁴⁰ supra note 34, at 67-74; supra note 32, at 416-417, See also Figures see also Figure 10.

⁴¹ Rosalind Ormiston, *50 Art Movements you should know from Impressionism to Performance Art* (Prestel, 2014), 44-45; see also Figures 11,12.

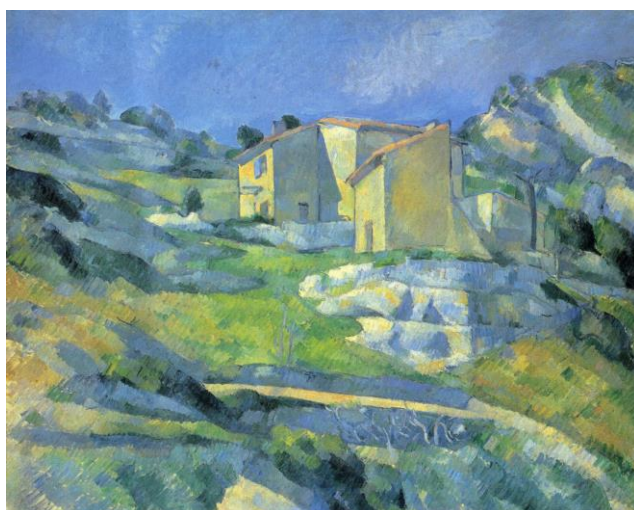
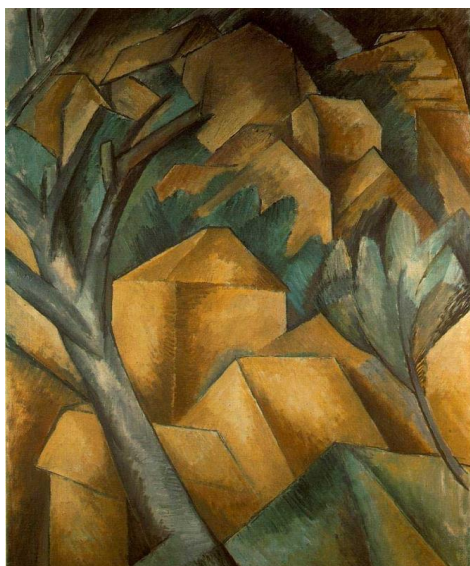


Figure 11 (left): Georges Braque, (1908). *Houses at L' Estache*. [Oil on canvas, 76x60 cm], Lille: Lille Métropole Museum of Modern, Contemporary and Outsider Art (LaM) (online) (Retrieved from: <https://pabque.weebly.com/houses-at-lrsquoestaque.html>; <https://www.wikiart.org/en/georges-braque/houses-at-estaque-1908> [Accessed 5 Nov. 2019].

Figure 12 (right): Paul Cezanne, (1880). *Houses at L' Estache*. [Oil on canvas, 65x81 cm], Washington, DC, USA: National Gallery of Art. (online) (Retrieved from: http://art-cezanne.com/cezanne_1880_11.html [Accessed 05 Nov. 2019].

Whereupon, the above practice was further established during Marcel Duchamp's legacy and his "readymades".⁴² The emergence of the quotidian object and its presentation as pure Art was undoubtedly a unique innovation which gave rise to many controversial opinions. In 1917, Duchamp exhibited in New York the "Fountain", the famous urinal as a sculpture, causing a slew of reactions.^{43, 44} (Fig.13). After that, Duchamp declared the following: "*My idea was to choose an object that wouldn't attract me, either by its beauty or by its ugliness. To find a point of indifference in my looking at it, you see*".⁴⁵ Duchamp managed to convert the conventional notion of Art transforming the utilitarian daily object to work of Art. He contributed, as a member of

⁴² Elizabeth Mix, "Appropriation and the Art of Copy (May 2015): Marcel Duchamp and the Conceptual Shift of the Copy", Choice, (20 June 2016) [online] Available at: <https://ala-choice.libguides.com/c.php?g=372675&p=2520119> [Accessed 06 Nov. 2019].

⁴³ Eleanor Heartney, *Art & Today* (Phaidon, 2008), 40-41.

⁴⁴ Janis Mink, *Duchamp* (Taschen, 2013), See also Figure 13.

⁴⁵ "Marcel Duchamp", Quote fancy [online] Available at: <https://quotefancy.com/quote/1168195/Marcel-Duchamp-My-idea-was-to-chose-an-object-that-wouldn-t-attract-me-either-by-its> [Accessed 06 Nov. 2019].

the Dada movement, to the openness of the way people perceived Art until then, proving that even a found object of mass production can be interpreted as Art.^{46, 47}



Figure 13: Marcel Duchamp, *Fountain*, (1914), [replica 1964, Porcelain, Unconfirmed: 360 × 480 × 610 mm], © Succession Marcel Duchamp/ADAGP, Paris and DACS, London 2020. London: Tate (online), Retrieved from: <https://www.tate.org.uk/art/artworks/duchamp-fountain-t07573> [Accessed 05 Nov. 2019].

Appropriation practice was also common in the Surrealists whose work was primary based on collage and objects. Salvador Dali's "Lobster Telephone", 1938, Tate London^{48, 49} (Fig.14) consists a typical example of the aforementioned technique. In the mid 20th century, the evolution of Appropriation Art pierces in the works of Robert Rauschenberg⁵⁰ (Fig.15) and Jasper Jones with the extensive use of collage and photography in their painting works⁵¹ (Fig.16). Eduardo Paolozzi is also numbered among the appropriation artists of the era, whose the main artistic tool-medium was the use of collage, remixed with advertisements or photos from magazines⁵² (Fig.17).

⁴⁶ Hal Foster and Rosalind Krauss, *Art Since 1900: Modernism, Antimodernism and Postmodernism* (Thames & Hudson, 2004), 127-129, (from greek).

⁴⁷ supra note 34, at 457-459.

⁴⁸ *The Art Book* (Phaidon, 2012), 136; see Figure 14, Lobster Telephone, 1936, Salvador Dali.

⁴⁹ supra note 34, at 462-463.

⁵⁰ Marion Maneker, "Rauschenberg's Buffalo II Leads Mayer Collection at Christie's", *Art Market Monitor*, 01 March 2019. [online], Available at: <https://www.artmarketmonitor.com/2019/03/01/rauschenbergs-buffalo-ii-leads-mayer-collection-at-christies/> [Accessed 07 Nov. 2019]; See also Fig. 13.

⁵¹ supra note 34, at 309-311; See also Figure 15.

⁵² Martin Simon, "How Eduardo Paolozzi channelled the chaos of Modern Life", 30 March 2017. [online] Available at: <https://www.theartnewspaper.com/review/how-eduardo-paolozzi-channelled-the-chaos-of-modern-life> [Accessed 08 Nov. 2019], see also Fig. 14. [Accessed 05 Nov. 2019].



Figure 14: Salvador Dalí, *Lobster Telephone*, (1936). (Original Title: Telephone Homard). [Steel, plaster, rubber, resin and paper, Object: 178 × 330 × 178 mm], London: Tate. © Salvador Dalí, Gala-Salvador Dalí Foundation/DACS, London 2020. (online) Retrieved from: <https://www.tate.org.uk/art/artworks/dali-lobster-telephone-t03257> [Accessed 05 Nov. 2019].



Figure 15 (left): Robert Rauschenberg, *Buffalo II* (1964). [Oil and silkscreen ink on canvas 96 x 72 in. (243.8 x 183.8 cm.)], Courtesy of Christie's Images Ltd. Christie's Auction House. (online) Retrieved from: <https://news.artnet.com/market/rauschenberg-market-hed-tkttkktt-1547860> <https://www.christies.com/lotfinder/Lot/robert-rauschenberg-1925-2008-buffalo-ii-6205129-details.aspx> [Accessed 05 Nov. 2019].

Figure 16 (right): Sir Eduardo Paolozzi, (1948). *Meet the People*. [Printed papers on card, dimensions: 359 x 241 mm]. London: Tate (online) Retrieved from: <https://www.tate.org.uk/art/artworks/paolozzi-meet-the-people-t01459> [Accessed 05 Nov. 2019].



Figure 17: Jasper Jones, (1969), *Flag (Moratorium)*. [Offset lithograph in colors, on wove paper, with full margins. l. 17 1/8 x 25 7/8 in. (43.5 x 65.7 cm)], Phillips Auction House. (online) Retrieved from: <https://www.phillips.com/detail/jasper-johns/NY030218/68> [Accessed 5 Nov. 2019].

Apart from the contribution of the artists above, the pinnacle of Appropriation Art actually was marked during the 60's reflecting its practices in Pop Art movement.⁵³ It is necessary to mention the pervasive and leading artists of popular culture era who featured their works under the influence of dominating consumerism in societies after World War II. Particularly, the well-known artists Andy Warhol, Roy Lichtenstein, Richard Hamilton and James Rosenquist were undoubtedly the protagonists of Pop Art. These leading artists introduced in a great extent the appropriation practices of collage and prints in their experimental works, criticizing the boundaries between high and low art.⁵⁴, ⁵⁵, ⁵⁶ (Fig.18). Andy Warhol's genius pushed the boundaries of pop art following his obsession with the ubiquity of the packaged commodity⁵⁷ (Danto). Brillo box was one of his provocative and innovative works blurring the viewers' perception

⁵³ supra note 32, at 533-535.

⁵⁴ Jim Nielson, "03 Appropriation in Pop Art" Remix Culture. [online] Available at: <http://remixculture.ca/appropriation-in-pop-art/> [Accessed 07 Nov. 2019].

⁵⁵ supra note 34, at 317-326.

⁵⁶ Alastair Sooke, "Richard Hamilton and the work that created Pop Art", BBC, 24 August 2015, [online], Available at: <http://www.bbc.com/culture/story/20150824-richard-hamilton-and-the-work-that-created-pop-art> [Accessed 07 Nov. 2019]; see also Figure. 18.

⁵⁷ Arthur C. Danto, *Philosophizing Art: Selected essays* (University of California Press, Berkeley and Los Angeles, California, 1999), 61-83. "The Pop Artist did images that anyone walking down Broadway could recognize in a second - comics, picnic table, men's trousers, celebrities, shower curtains, refrigerator, cake bottles - all the great modern things the abstract expressionism tried so hard not to notice at all". (p. 74).

about a simple object and a piece of high art⁵⁸, ⁵⁹, ⁶⁰ (Fig.19). On the other hand, Lichtenstein, was deeply affiliated with the comics and appropriated cartoon sources to his famous works.⁶¹ In addition, during the early 60s John Baldessari was emerged as an eminent figure of appropriation art, choosing systematically images, prints and found photographs incorporating them to his works creating a new narration⁶² (Fig. 20,21).



Figure 18 (left): Richard Hamilton, (1972), *Release*. [Screenprint on paper, Image: 683 × 857 mm], London: Tate, (online) (Retrieved from: <https://www.tate.org.uk/art/artworks/hamilton-release-p04254>) [Accessed 05 Nov. 2019].

Figure 19 (right): Andy Warhol, 1964, *Brillo Box (Soap Pads)*, Synthetic polymer paint and silkscreen ink on wood, 17 1/8 x 17 x 14" (43.3 x 43.2 x 36.5 cm). © 2019 Andy Warhol Foundation for the Visual Arts/Artists Rights Society (ARS), New York. (online) Retrieved from: <https://www.moma.org/collection/works/81384> [Accessed 05 Nov. 2019].

⁵⁸ supra note 41, at 51-56; see also Figure. 19.

⁵⁹ Julian Bell, *Mirror of the World, A New History of Art* (Thames & Hudson, 2010), 430-431.

⁶⁰ Arthur C. Danto, "The Artworld" *The Journal of Philosophy*, [online] vol. 61, no. 19, 1964: 571-584. Available at: *JSTOR*, www.jstor.org/stable/2022937. [Accessed 13 Nov. 2019]

⁶¹ supra note 41, at 102-103.

⁶² see figures 20,21.



Figure 20 (left): John Baldessari, (1988), *Studio*. [Lithograph and silkscreen on Somerset paper Sheet: 30 1/4 x 38 1/2 in. (76.84 x 97.79 cm) Image: 25 3/4 x 34 in. (65.41 x 86.36 cm)], Los Angeles: Los Angeles County Museum of Art (LACMA), (online) Retrieved from: <https://collections.lacma.org/node/176836>. [Accessed 05 Nov. 2019].

Figure 21 (right): John Baldessari, (2004), *Umbrella (Orange): With Figure and Ball (Blue, Green)*. [Three-dimensional digital archival print with acrylic paint on Sintra, Dibond, and Gatorfoam panels, 120 3/8 x 107 3/8 x 3 1/2 inches (305.8 x 272.7 x 8.89 cm)], New York: Solomon R. Guggenheim Museum (online) Retrieved from: <https://www.guggenheim.org/artwork/13308> [Accessed 05 Nov. 2019].

Apart from the aforementioned chronological analysis and according to my painstaking research, my firm belief is that the genre of appropriation has deeply its roots in the late 70's, where a group of artists, belonging to the well-known post-modern photographers ("Pictures Generation" movement),⁶³ applied in their works preexisting elements, images or icons of mass media, gleaned photographs or messages refiguring them in their works in order to give a new perception under a quite different context.⁶⁴, ⁶⁵, ⁶⁶. The above appropriation artists were always aware of their method to show the viewer that their work resembled another previous or preexisting work, aiming on the critical observation and the examination of social issues and other subject matters related to identity and mass culture.

⁶³ "The Pictures Generation Movement Overview". The Art Story, [online], Available at: <https://www.theartstory.org/movement/the-pictures-generation/> [Accessed 07 Nov. 2019].

⁶⁴ supra note 46, at 624-627.

⁶⁵ Douglas Eklund, "The Pictures Generation", Met Museum. (2004) [online], Available at: https://www.metmuseum.org/toah/hd/pccn/hd_pccn.htm [Accessed 07 Nov. 2019]

⁶⁶ Martin Dean, "Who were the Pictures Generation?" Sotheby's, 22 February 2018, [online] Available at: <https://www.sothebys.com/en/articles/who-were-the-pictures-generation> [Accessed 7 Nov. 2019].

For instance, Sherrie Levine the female photographer who reproduced previous well-known photos, as “After Walker Evans” with little or without modifications, addressed the ideas of originality in her artworks⁶⁷, ⁶⁸ (Fig. 22,23). What Levine made was to re-photograph reproductions of previous photographs from eminent photographers of the post-modern era and turn them to her own artistic concept, making the viewer to rethink the conventional way of representation, setting a completely new meaning.⁶⁹, ⁷⁰ Under that prism, Levine aimed to draw the viewers’ attention and make them aware them about the artistic legacy and the uniqueness of the artwork, challenging simultaneously questions of authenticity in Art.⁷¹, ⁷²



Figure 22 (left): Walker Evans, Alabama Cotton Tenant Farmer's Wife, 1936. Printed 1976, gelatin silver print. (online) Retrieved from: <https://florencegriswoldmuseum.org/exhibitions/online/the-exacting-eye-of-walker-evans/>, <https://www.smithsonianmag.com/smithsonian-institution/walker-evans-wrote-story-american-with-his-camera-180959353/>.

Figure 23 (right): Sherrie Levine, 1981, After Walker Evans: 4, Gelatin silver print Dimensions: 12.8 x 9.8 cm (5 1/16 x 3 7/8 in.) (online) Retrieved from: <https://www.metmuseum.org/art/collection/search/267214> [Accessed 07 Nov. 2019].

⁶⁷ “After Walker Evans: 4”, Sherrie Levine, Met Museum, [online], Available at: <https://www.metmuseum.org/art/collection/search/267214> [Accessed 07 Nov. 2019].

⁶⁸ Renske Van Leewuen, “Sherrie Levine: Re-photographed photographs of reproductions of photographs”, Fans in a Flashbulb, 29 October 2013. [online], Available at: <https://fansinaflashbulb.wordpress.com/2013/10/29/sherrie-levine-re-photographed-photographs-of-reproductions-of-photographs/> [Accessed 10 Nov. 2019].

⁶⁹ David Rimanelli, “Review Sherrie Levine”, *Frieze*, 06 May 1994 (First published in Issue 16), [online], Available at: <https://frieze.com/article/sherrie-levine> [Accessed 07 Nov. 2019].

⁷⁰ “Reading: Appropriation (The “Pictures Generation”)”. Lumen Learning, [online], Available at: <https://courses.lumenlearning.com/masteryart1/chapter/reading-appropriation-the-pictures-generation/> [Accessed 07 Nov. 2019].

⁷¹ Howard Singerman, *Art History, After Sherrie Levine* (University of California Press, 2011).

⁷² Tim Martin, “Sherrie Levine”, *Frieze*, 11 November. 1996, [online], Available at: <https://frieze.com/article/sherrie-levine-0> [Accessed 15 Nov. 2019]

Among the artists of “Pictures Generation” was also included the celebrated influential artist Cindy Sherman⁷³ whose personal fictitious adaptations in a variety of roles (as a model herself, imitating cinema personas) launched the appropriation strategy in the post-modern era⁷⁴ (Fig.24). She had invented diverse characters masquerading herself in order to attack the dominant stereotypes of society and mass culture (like the prevailing of men, the female beauty and women’s social status), deriving her transformative experience from the film industry.⁷⁵ Sherman’s self-portraits aimed to challenge the old-fashioned pictorial way of representation under a unique provocative way of exploration, posing afterwards the fundamental questions of originality, authenticity and reproducibility in relation to Art. Iconic portraits of Sherman’s exaggerated made-up figure have been displayed in many prestigious art galleries, challenging the desires and the inner feelings of the audience.



Figure 24: Cindy Sherman, Untitled # 474.2008, Chromogenic color print, 76 3/4 x 60" (230.5 x 152.4 cm). New York: The Museum of Modern Art. Acquired through the generosity of an anonymous donor, Michael Lynne, Charles Heilbronn, and the Carol and David Appel Family Fund © 2012 Cindy Sherman. (online) Retrieved from: <https://www.moma.org/calendar/exhibitions/1154?slideshow=17&slide=5> [Accessed 07 Nov. 2019].

⁷³ “Cindy Sherman”, National Portrait Gallery. [online], Available at: <https://www.npg.org.uk/blog/cindy-sherman>. [Accessed 07 Nov. 2019].

⁷⁴ supra 34, at 676-677; See also Figure 24.

⁷⁵ “Contemporary conversations with the Old Masters”, Christies’s, 26 October 2016, [online], Available at: <https://www.christies.com/features/Contemporary-artists-inspired-by-Old-Masters-7794-1.aspx> [Accessed 07 Nov. 2019].

Additionally, Barbara Kruger,⁷⁶, ⁷⁷, ⁷⁸ the famous 80s feminist artist and the controversial artist, Richard Prince, are considered the prominent figures of contemporary appropriation art. Barbara Kruger's practice was focused on encapsulating texts in black or red bold words on silkscreen prints, highlighting issues of modern society like gender, identity and consumption, questioning the ideas of originality and authenticity⁷⁹, ⁸⁰, ⁸¹ (Fig. 25). She used her graphic designing background in order to create painting works in combination with references to advertisements and the mass culture, following the methods of cropping and reposition. On the other hand, Richard Prince⁸² (Fig. 26), a member of the "Pictures Generation" also, solidified his career pursuing the provocative appropriation tactic of "copying" and reworking photos (by cropping and enlarging them) from famous ads, depicting vividly the American lifestyle, or recalling suppressed themes in a way that undermined the originality of the work.

The art of Appropriation was further developed by the celebrated artist Jeff Koons,⁸³, ⁸⁴ related to the Neo-Pop movement in the 80s.⁸⁵ The radical figure of Jeff Koons dominated the last decades in the art domain, dividing often the public opinion due to the subject of his works with an emphasis in the systematic process of reproduction. Particularly, Koons's work varies and expands in many artistic categories, such as sculpture, paintings and installations of readymades - objects of pop culture⁸⁶ (Fig. 27,28).

⁷⁶ supra note 34, at 612.

⁷⁷ Hobert S. Nelson and Richard Shiff, *Critical Terms for Art History* (University of Chicago Press, 2003), 165-166.

⁷⁸ Linda Napikoski, "Barbara Kruger, Feminist Artist and Photographer", ThoughtCo. 01 December 2017, [online] Available at: <https://www.thoughtco.com/barbara-kruger-bio-3529938> [Accessed 11 Nov. 2019].

⁷⁹ Mayer Rus, "A bold social commentary since the 1970s Barbara Kruger's art is as incisive as ever", Wallpaper, 26 Jan. 2019, [online] Available at: <https://www.wallpaper.com/art/barbara-kruger-profile> [Accessed 1 Nov. 2019].

⁸⁰ Yang Hai, "Barbara Kruger: Slogans that shake the artworld" (Spring 2018). [online] Available at: <https://blogs.commonsg Georgetown.edu/cctp-802-spring2018/2018/05/04/barbara-kruger-slogans-that-shake-the-artworld/> [Accessed 11 Nov. 2019]

⁸¹ Charles Harrison & Paul Wood, *Art in Theory 1900-2000: An Anthology of Changing Ideas*, (Blackwell, 2009), 1041-1042.

⁸² supra note 34, at 678-679; see also Figure 26.

⁸³ Hans Werner Holzwarth. *Art Now*, Vol. 3 (Taschen, 2012), 232-235.

⁸⁴ James Putnam, *Art and Artifact, The Museum as Medium* (Thames & Hudson, 2009), 36-37.

⁸⁵ "Jeff Koons", Gagosian, [online] Available at: <https://gagosian.com/artists/jeff-koons/> [Accessed 08 Nov. 2019].

⁸⁶ supra note 83, at 172-175; Jeff Koons and Norman Rosenthal, *Jeff Koons: Conversations with Norman Rosenthal* (Thames & Hudson, 2014); see also Figures 27,28.

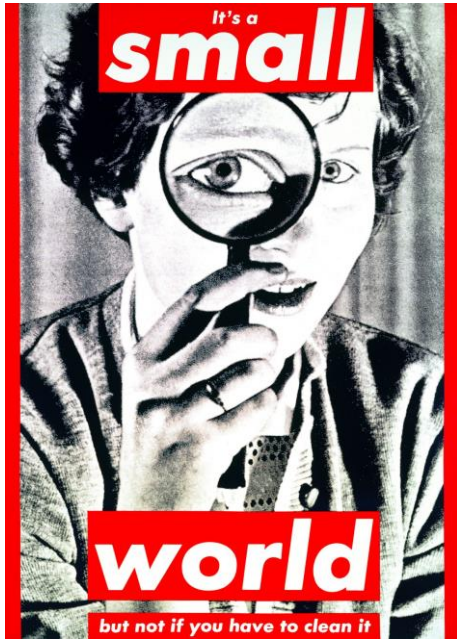


Figure 25 (left): Barbara Kruger, *Untitled (It's a small world but not if you have to clean it)*, (1990). [Photographic silkscreen on vinyl, 143 x 103 in. (363.2 x 261.6 cm)], Los Angeles: The Museum of Contemporary Art. [online] Retrieved from: <https://www.moca.org/collection/work/untitled-its-a-small-world-but-not-if-you-have-to-clean-it> [Accessed 07 Nov. 2019].

Figure 26 (right): Richard Prince *Untitled (Cowboy)*, (1989). [Chromogenic print, 127 x 177.8cm (50 x 70in.)], New York: The Metropolitan Museum of Art (MET). [online] Retrieved from: <https://www.metmuseum.org/art/collection/search/283742> [Accessed 07 Nov. 2019].

The similar artistic exploration of appropriation technique exercised also remarkable contemporary artists, such as Damien Hirst⁸⁷ (Fig. 29) and Takashi Murakami,⁸⁸ whose artworks nearly comprise a "product" of copying and appropriation⁸⁹ (Fig. 30).

⁸⁷ see Figure 29.

⁸⁸ Grace McQuilten, "Takashi Murakami: The Meaning of the Nonsense of the Meaning". Menlo Park, March 2013, [online] Available at: <http://menlopark.ca/takashi-murakami-the-meaning-of-the-nonsense-of-the-meaning/>; Bisbee, Abigail. "CCTP725: Cultural Hybridity: Remix and Dialogic Culture." CCTP725 Cultural Hybridity Remix and Dialogic Culture, 14 December 2013. [online] Available at: <https://blogs.commonsgorgetown.edu/cctp-725-fall2013/2013/12/14/commercialism-and-international-art-world-takashi-murakami-and-the-rise-of-the-new-international-artist/> [Accessed 12 Nov. 2019].

⁸⁹ see Figure. 30.



Figure 27 (left): Jeff Koons, New Hoover Convertibles, Green, Red, Brown, New Shelton Wet/Dry 10 Gallon Displaced Doubledecker, 1981-7. 4 vacuum cleaners, Perspex and fluorescent lights, 2510 x 1370 x 715 mm, © Jeff Koons.(online) Retrieved from:<https://www.tate.org.uk/art/artworks/koons-new-hoover-convertibles-green-red-brown-new-shelton-wet-dry-10-gallon-displaced-ar00077>

Figure 28 (right): Jeff Koons, Michael Jackson and Bubbles, 1988 © Jeff Koons. (online) Retrieved from: <https://www.modernamuseet.se/stockholm/en/exhibitions/sculpture-after-sculpture/introduction/> [Accessed 07 Nov. 2019].



Figure 29: Damien Hirst, *Away from the Flock*, (1994), [Glass, stainless steel, perspex, acrylic paint, lamb and formaldehyde solution, displayed: 960 × 1490 × 510 mm]. © Damien Hirst and Science Ltd. All rights reserved, DACS 2018. Photo: Prudence Cuming Associates Ltd, [online], Retrieved from: <https://www.tate.org.uk/art/artworks/hirst-away-from-the-flock-ar00499>

Figure 30: Takashi Murakami. *Miss Ko²* (1997). [Oil paint, acrylic, synthetic resin, fiberglass, and iron. 72 x 25 x 32 1/2 in. (182.9 x 63.5 x 82.6 cm).] New York: Phillips Auction House. [online], Retrieved from: <https://www.phillips.com/detail/takashi-murakami/NY010710/10> [Accessed 07 Nov. 2019].

Moreover, during the research, my discoveries disclosed many more contemporary artists of the 21st century employing appropriation practice. For example, the impact of Yasumasa Morimura⁹⁰ (Fig. 31) whose artistic method was based on appropriating resonant images from art history, incorporating them into his own artistic project⁹¹ must be underlined. Recently, the well-known artist, Glenn Brown, inaugurated his exhibition in Paris at the National Museum of Eugene Delacroix,⁹² based on his practice of reproducing images from art history after alterations⁹³ (Fig. 32). In that case, the arising question was whether the new artwork belonged to the “inspiring borrowing” or to a pure copying, illustrating the thin line between the original and the transformative work.



Figure 31 (left): Yasumasa Morimura, “*Doublonnage (Marcel)*” (1988), [Chromogenic print, 149.9 x 120cm (59 x 47 1/4”)] [online] Courtesy of the artist and Luhring Augustine Gallery, New York. © Yasumasa Morimura. (online) (Retrieved from: <https://www.dazeddigital.com/art-photography/article/42183/1/yasumasa-morimura-japanese-artist-icons-art-history-ego-obscure>) [Accessed 07 Nov. 2019].

Figure 32 (right): Glenn Brown, *Reproduction*. (2014). [Oil on panel, 135 x 101 cm], London: Saatchi Gallery. (online) (Retrieved from: https://www.saatchigallery.com/artists/glenn_brown.htm) [Accessed 07 Nov. 2019].

⁹⁰ Miss Rosen, “The Japanese artist putting himself in the world’s most famous art works”, Dazed, 15 November 2018, [online] Available at: <https://www.dazeddigital.com/art-photography/article/42183/1/yasumasa-morimura-japanese-artist-icons-art-history-ego-obscure> [Accessed 08 Nov. 2019]. See also Figure 31.

⁹¹ “Yasumasa Morimura”, Artnet, [online] Available at: <http://www.artnet.com/artists/yasumasa-morimura/> [Accessed 12 Nov. 2019].

⁹² see the recently displayed Glenn Brown’s exhibition at Museum Eugene-Delacroix in Paris. “Engaging with the ennobled subjects of portraiture and nature, themes also explored by Delacroix, Glenn Brown transposes the work of his predecessor into his own complex and unique artistic language”. [online] Available at: <https://glenn-brown.co.uk/exhibitions/138/>

⁹³ see Figure 32.

Ken Aptekar belongs also to the artists that rework of old masters and over-paint them with ironical texts aiming to transfuse a challenging and humoristic interpretation⁹⁴ (Fig.33). Louise Lawler,⁹⁵ often re-photographs previous noted works and repositions them in a new context⁹⁶ (Fig.34). Finally, John Stezaker,⁹⁷ the famous British artist who uses collage as a main tool, appropriates vintage photos and old cards, embracing them with a surrealistic “grid” invoking uncanny feelings⁹⁸ (Fig.35). Elaine Sturtevant⁹⁹ is included also in the vast list of the devotees American artists who pushed over the edge of appropriation art replicating famous preexisting works of celebrated artists such as Andy Warhol and Marcel Duchamp. She is considered the master of appropriation as far as she managed to create inexact copies of the recognized works in order to challenge the traditional notions of authenticity and originality in Art¹⁰⁰ (Fig. 36).



Figure 33: Ken Aptekar, *Just Then*. (2006), [Diptych, oil on wood, sandblasted glass bolts, 30"x60" (76.2cm x152.4cm)], After Giorgio di Chirico, *Mystery and Melancholy of a Street*, 1914 Giorgio di Chirico, *Melamconia*, 1912. (online) Retrieved from: <http://kenaptekar.net/2007-2/> [Accessed 07 Nov. 2019].

⁹⁴ see Figure 33.

⁹⁵ Andrew Durbin, "Louise Lawler", *Frieze*, No 189, September 2017, 162-163.

⁹⁶ Alex Greenberger, "Beg, Borrow, Steal: With Several Exhibitions Involving Appropriation, New York Has a Second "Pictures" Moment", *Artnews*, 21 August 2017. [online] Available at: <http://www.artnews.com/2017/08/21/beg-borrow-steal-with-several-exhibitions-involving-appropriation-new-york-has-a-second-pictures-moment/> [Accessed 13 Nov. 2019]; see also Figure 34.

⁹⁷ John Stezaker et al. *Akademie X: Lessons in Art & Life*, Phaidon, (2015), 278-282.

⁹⁸ "John Stezaker", Saatchi Gallery, [online] Available at: https://www.saatchigallery.com/artists/john_stezaker.htm; [Accessed 12 Nov. 2019]; See also Figure 35.

⁹⁹ "Sturtevant" Galerie Thaddaeus Ropac, [online] Available at: <https://www.ropac.net/artist/sturtevant-estate> [Accessed 12 Nov. 2019].

¹⁰⁰ see Figure 36.

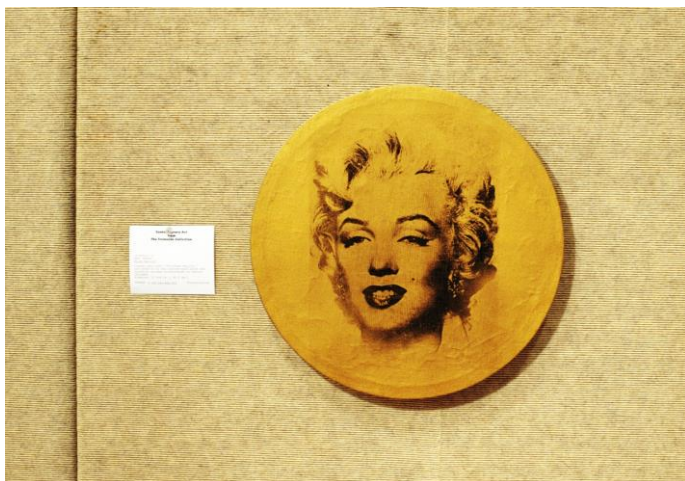


Figure 34: Louise Lawler, *Does Andy Warhol Make You Cry?*. (1988). [Silver dye bleach print with text on plexiglass wall label, image: 27 ¼ × 39 inches; label: 4 ¾ × 6 ¾ inches]. Image courtesy the artist. (online) Retrieved from: <https://4columns.org/deitcher-david/louise-lawler>. [Accessed 07 Nov. 2019].



Figure 35 (left): John Stezaker *Mask XIV*, 2006, postcard on paper on photo-etching on paper, 240x200 mm, © John Stezaker. (online) Retrieved from: <https://www.tate.org.uk/art/artworks/stezaker-mask-xiv-t12347> [Accessed 07 Nov. 2019].

Figure 36 (right): Elaine Sturtevant, *D'après Martial Raysse, "Peinture a Haute-Tension"*, (1968). [Acrylic on paper laid down on canvas, white neon and transformer 63 7/10 × 38 1/5 × 5 9/10 in 161.8 × 97 × 15 cm]. (online) Retrieved from: <https://www.artsy.net/artwork/sturtevant-dapres-martial-raysse-peinture-a-haute-tension> [Accessed 07 Nov. 2019].

2.3. Appropriation Art: A Dialogue with Aesthetic Theories, Philosophy and Criticism.

The rising of Appropriation Art was not ignited only by the inner artist's curiosity to explore the antecedent ways of artistic creation. The majority of appropriation artists have been influenced by the seminal writings of the theorists, philosophers and art critics who made their debut in the post-modern era. The impact of prominent thinkers and philosophers such as Walter Benjamin, Roland Barthes and Jean Baudrillard on the postmodern art production was blatant and unchallenged.¹⁰¹

Tracing back to the German philosopher Walter Benjamin's¹⁰² theory illustrating the concept of "aura"¹⁰³ in Art at his famous essay "*The Work of Art in the Age of its Technological Reproducibility*",¹⁰⁴ the reader is familiarized with the factors that "debilitate" the original work of art because of the intrusion of the technological advancement.¹⁰⁵, ¹⁰⁶ What Benjamin made was to expand his interpretation concerning the artwork, underlying that every technological interference in the artistic creation simultaneously disrupted and abrogated the essence - the concept of originality.¹⁰⁷, ¹⁰⁸,
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¹⁰¹ Mix Elizabeth, "Appropriation and the Art of Copy (May 2015): Copying after 1960". Lipguides, 20 June 2016, [online] Available at: <https://ala-choice.libguides.com/c.php?g=372675&p=2566140> [Accessed 13 Nov. 2019].

¹⁰² "Walter Benjamin", The Art Story, [online] Available at: <https://www.theartstory.org/influencer/benjamin-walter/> [Accessed 13 Nov. 2019].

¹⁰³ "Aura - Art Term", Tate, [online] Available at: <https://www.tate.org.uk/art/art-terms/a/aura> [Accessed 13 Nov. 2019].

¹⁰⁴ Walter Benjamin, "The Work of Art in the Age of its Technological Reproducibility", Second Version, in *The Work of art in the Age of its Technological Reproducibility, and Other Writings on Media*, ed. Michael W. Jennings, Brigid Doherty, and Thomas Y. Levin. (Cambridge, Mass: Harvard University Press, 2008), 19-55.

¹⁰⁵ Shinjini, "Walter Benjamin - The Work of art in the Age of its Technological Reproducibility", Shakespeare in the Digital Age, 31 January 2017, [online] Available at: <https://sites.nd.edu/visconsi-holland/2017/01/31/walter-benjamin-the-work-of-art-in-the-age-of-its-technological-reproducibility/> [Accessed 13 Nov. 2019].

¹⁰⁶ Julie C. Van Camp, "Originality in Postmodern Appropriation Art", (2007) [online] Available at: https://www.academia.edu/37808981/Originality_in_Postmodern_Appropriation_Art [Accessed 12 Nov. 2019].

¹⁰⁷ Magdalena Zieba-Grodzka, "Authenticity (Aura) Recycled. Erasing Originality in Appropriation Art." Politics of Erasure. From "Damnatio Memoriae" to Alluring Void, (2014). [online] Available at: https://www.academia.edu/24670285/Authenticity_Aura_Recycled._Erasing_Originality_in_Appropriation_Art [Accessed 12 Nov. 2019].

¹⁰⁸ Harrison, supra note 81 at 520-527.

¹⁰⁹ Peter Burger, *Theory of the Avant-Garde. "Regarding the Discussion of Benjamin's Theory of Art.* Vol. 4 (Manchester University Press, 1984), 80-87.

On the same intellectual direction with Walter Benjamin another eminent thinker of postmodern era, the French philosopher and writer Roland Barthes¹¹⁰, influenced heavily with his profound essays many artists engaged with appropriation technique. Barthes's pivotal work, "The Death of the Author",^{111, 112} 1968 reflects his seminal ideas about authorship and originality which were summarized on the following clause: "*The birth of the reader must be at the cost of the death of the Author*"¹¹³ (p.148). Barthes's theory has been adopted by many art critics in the domain of Art paraphrasing his quote above, demonstrating "the Death of the Artist" in the post-modern era. Therefore, according to Barthes's ideas the viewer is the only one that accomplishes the pure interpretation of the work each time, rejecting the dominant figure of the author - artist.

Last but not least, Jean Baudrillard, who is considered as one of the most celebrated figures in philosophy and cultural theory, has colored the perception of post-modern appropriation artists with his cutting ideas¹¹⁴. Based on the term "simulacrum" which derives from the Platonic texts, meaning "*a copy of a copy of an ideal form*"

¹¹⁰ Anu Arora, "The Death of the Author (by Roland Barthes)", *International Journal of Recent Research in Social Sciences and Humanities (IJRSSH)* Vol. 4, Issue 2, (April - June 2017): 176-179. Available at: [file:///C:/Users/User/Downloads/The%20Death%20of%20the%20Author-987%20\(3\).pdf](file:///C:/Users/User/Downloads/The%20Death%20of%20the%20Author-987%20(3).pdf) [Accessed 10 Jan. 2020].

Barthes posited that since there is not actually a static interpretation of the author's writings as far as the reader is involved substantially in the reading process, the writer's conventional authority is being dismissed. Barthes's text is an attack at the traditional option of the author as a "modulator" of literature. What he strongly alleges concerns the fact that there is always a dialogue, an interaction between the reader - the audience and the writer, in a way that it recreates the "original" work, under the impact of the reader's experience. Therefore, under the prism of the constant flow, the meanings become more and more relative - subjective, affecting each one reader who determines the context of originality of the work, a fact that leads to the shifting of the dominant author's stability.

¹¹¹ Andrew Robinson, "An A to Z of Theory, Roland Barthes: Death of the Author". (14 Oct. 2011) [online] Available at: <https://ceasefiremagazine.co.uk/in-theory-barthes-4/> [Accessed 14 Nov. 2019].

¹¹² Yogesh Kashikar, "A celebration of "The Death of Author" in Roland Barthes's essay." *RJOE Journal* 2018 3, no. 4 (2018): 188 to 192. [online] Available at: [https://www.academia.edu/37883273/A_ CELEBRATION_OF_THE_DEATH_OF_AUTHOR_IN_ROLAND_BARTHESS_essay](https://www.academia.edu/37883273/A_CELEBRATION_OF_THE_DEATH_OF_AUTHOR_IN_ROLAND_BARTHESS_essay)

¹¹³ Roland Barthes, *The Death of the Author*, (London, Fontana, 1977), 142-148. [online] Available at: <http://sites.tufts.edu/english292b/files/2012/01/Barthes-The-Death-of-the-Author.pdf> [Accessed 15 Nov. 2019].

¹¹⁴ Jean Baudrillard, *Simulacra and Simulation*, (translated by Shelia Glaser) (The University of Michigan Press, 2005).

The comprehensive examination of Baudrillard's theory established in the role of the simulacrum refers to the loss of reality which has been replaced by the replicated object and it's theoretical approach is embodied in the following phrase: "We live in a world where there is more and more information, and less and less meaning", (*Simulacra and Simulation*).

(Tate, definition).¹¹⁵, ¹¹⁶ Baudrillard declared that the original, as a real notion has been replaced by the false copy, due to the prevailing of the postmodern culture's symbols - signs.¹¹⁷

Apart from the aforementioned philosophical aspects that contributed to the dissemination of appropriation strategy, an elaboration of the most intriguing opinions articulated by eminent art critics and art theorists from the art world is necessary. Namely, it was in 1977 when the profound art historian and art critic Douglas Crimp,¹¹⁸ first inaugurated a show with the title "Pictures" at Artists Space, New York, displaying emerging - young artists associated with appropriation process, exploring the ideas about "representation" relied on theory of semiotics. Crimp in his pivotal essay "On the Museum's Ruins", has adopted Benjamin's theory and deconstructed the traditional concepts of authorship, authenticity and originality in art, echoing the hybrid artistic methods of artists such as Sherrie Levine and Robert Rauschenberg.¹¹⁹, ¹²⁰ The same model of analyzing the concept of appropriation art was also adopted by the author of "The death of the art", Arthur Danto, the acknowledged philosopher and art critic, whose pivotal essays defined the post-modern motto of artistic creation in the phrase "anything goes" disconnecting the conventional means of art and providing a

¹¹⁵ Simulacrum", Tate, [online] Available at: <https://www.tate.org.uk/art/art-terms/s/simulacrum> [Accessed 15 Nov. 2019].

¹¹⁶ Doug Mann, "Jean Baudrillard, A Very Short Introduction". [online] Available at: <http://publish.uwo.ca/~dmann/ baudrillard1.htm> [Accessed 14 Nov. 2019].

"The term "simulacrum" goes all the way back to Plato, who used it to describe a false copy of something. Baudrillard has built his whole post-1970s theory of media effects and culture around his own notion of the simulacrum".

¹¹⁷ According to Baudrillard's point of view, the proliferation of mass media and technology has displayed the original significance, highlighting the consequences of the vagarious relation between reality and representation, arguing that: *"all we have now are simulations of reality, which aren't any more or less "real" than the reality they simulate"*; Lauren Andalib, "L'Art d' être", On "Simulacra and Simulations," Jean Baudrillard, (22 Oct. 2015), [online] Available at: <https://blogs.cornell.edu/laureenandalib/2015/10/22/on-simulacra-and-simulations-jean-baudrillard/> [Accessed 14 Nov. 2019].

¹¹⁸ Luke Ben, "Art historian Douglas Crimp, who defined the Pictures Generation, dies aged 74", The Art Newspaper, 08 July 2019, [online] Available at: <https://www.theartnewspaper.com/news/art-historian-douglas-crimp-who-defined-the-pictures-generation-dies-aged-74> [Accessed 18 Nov. 2019]; Douglas Crimp, "Pictures". [online] Vo. 8, No 1, Fall 2005, Available at: https://monoskop.org/images/7/72/Crimp_Douglas_1977_2005_Pictures.pdf, [Accessed 18 Nov. 2019].

¹¹⁹ Boris Groys, *Art Power* (MIT Press, Cambridge Massachusetts, 2008), 30-31. Crimp argues that: "Through reproductive technology, postmodernist art dispenses with the aura. The fiction of the creating subject gives way to a frank confiscation, quotation, excerptation, accumulation, and repetition of already existing images. Notions of originality, authenticity, and presence...are undermined".

¹²⁰ Robert Rauschenberg, Leo Steinberg, *Robert Rauschenberg, October Files 4*, MIT Press, (2002), 70.

freed way of encountering Art.^{121, 122} Subsequently, Jerry Saltz,¹²³ the famous American - Pulitzer prize winner - art critic has underlined vivaciously the impact and the dissemination of appropriation art arguing that: *"Appropriation is the idea that ate the art world"*.¹²⁴

The interconnection of appropriation art with the fundamental aesthetic theories provides usually the justifiable basis for its extraordinary practices. However, the proliferation of appropriation art is not only inflamed by philosophical theories, but, as the paper discusses in the next level, is defined and formulated in monetary terms also by the real art market.

2.4. Appropriation Art and Economics: A Reciprocal Relation

In terms of economics, Appropriation Art, especially during the recent years, has played significant role affecting the art market components and boosting the financial growth. Undeniably, the provocative appropriation practice has been incorporated systematically in the projects, activities and programs of many contemporary cultural organizations,^{125, 126} such as museums, both public and private, foundations and institutions, which invest in appropriation art exhibitions relying on the huge interest of the

¹²¹ Arthur Danto, Wagner C. Altieri, A. M. & A.J. Cascardi, "Anything Goes": The Work of Art and the Historical Future. *UC Berkeley: Townsend Center for the Humanities*. (1997), 29 [online] Available at: <https://escholarship.org/uc/item/5pf0q7w3> [Accessed 19 Nov. 2019].

¹²² Jane O'Grady, (04 Nov. 2013). "Arthur Danto Obituary". [online] Available at: <https://www.theguardian.com/artanddesign/2013/nov/04/arthur-danto> [Accessed 20 Nov. 2019].

"Danto took up Hegel's declaration of 'the end of art'. In his essay The End of Art (1984), he claimed that art had progressed through three e phases..." "Art is about art and what art means, but not in an essentialist way (as in its middle, manifesto phase). In "our posthistorical era" there are no stylistic constraints – "anything goes".

¹²³ Eli Anapur, "The Most Unfluent Art Critics Today". *Widewalls*, (2017) [online] Available at: <https://www.widewalls.ch/art-critics/jerry-saltz/> [Accessed 15 Nov. 2019].

¹²⁴ Jerry Saltz on "The Pictures Generation" at the Metropolitan Museum of Art - *artnet Magazine*, 20 April 2009 [online] Available at: <http://www.artnet.com/magazineus/features/saltz/saltz5-18-09.asp> [Accessed 15 Nov. 2019].

"...Go to any Chelsea gallery or international biennial and you'll find it. It's there in paintings of photographs, photographs of advertising, sculpture with ready-made objects, videos using already-existing film".

¹²⁵ see exhibition Michalene Thomas: I Can't See You Without Me. *Wexner Center for Arts*. Columbus, Ohio. *Frieze*, Issue 199, 77.

¹²⁶ The Art Institute of Chicago inaugurates the art exhibition entitled "Andy Warhol: From A to B and Back Again". The blockbuster pop artist who brazenly appropriated images depicting celebrities and commodities, comes again to the front in order to reevaluate his artistic value. It's evident that the art-world insists and orients towards the appropriation artists. [online] Available at: <https://www.artic.edu/exhibitions/2937/andy-warhol-from-a-to-b-and-back-again> [Accessed 12 Nov. 2019].

audience.^{127, 128, 129} Additionally, it's a common policy of acclaimed and emerging contemporary art galleries to encourage appropriation artists and promote generally appropriation art.¹³⁰

Moreover, another determining factor that formulates the tendency and the taste for appropriation art, as a "cutting-edge" is recognized the art press, including art magazines, reviews, auction houses editions etc. For instance, the famous Canadian art magazine "esse" No 97, Fall 2019, dedicated its Fall number to "Appropriation" addressing an exceptional analysis based on reviews and interviews from eminent scholars¹³¹. Moreover, the immersion of Appropriation Art as a general artistic tendency is reflected drastically in the most important art shows and events worldwide. A close approach on the contemporary art scene supported by prestigious international Art Shows, such as Art Fair Paris, Fiac Paris,¹³² Art Basel, London Art Fair, Art Fair Miami etc. enriches the argument that the majority of produced art nowadays derives from the concept of appropriation.

Regarding the secondary art market, the pivotal role of appropriation art as controller of investments and modulator of aesthetic values and artistic tendencies has to be underlined. Particularly, in our age, a glance at the global art transactions through auction procedures (conventional or online auctions) and private sales, it

¹²⁷ see Exhibition: Andy Warhol to Cindy Sherman American Art from the Albertina Museum, Vienna, [online] Available at: <https://www.albertina.at/en/press/warhol-bis-sherman-die-albertina-zu-gast-in-linz/>, https://www.albertina.at/site/assets/files/9794/pressrelease_warhol_to_sherman_landesgalerie_linz.pdf

¹²⁸ see Christie's Magazine November - December 2019, p.47. See also, exhibition Marcel Duchamp: The Barbara and Aaron Levine Collection at Smithsonian's Hirshhorn Museum, Washington, D.C., United States. [online] Available at: <https://hirshhorn.si.edu/exhibitions/marcel-duchamp-the-barbara-and-aaron-levine-collection/>

¹²⁹ The art of appropriation consisted the core of the exhibition organized at the Kunsthalle Krems, the international exhibition center for modern and contemporary art in Lower Austria, in 2018, under the title "*Remastered. The Art of Appropriation*". According to the Mousse Magazine that released a relative article dedicated to the show: "*it focuses on works that are based on the symbolic or physical appropriation of other artworks*". [online] Available at: <https://www.kunsthalle.at/en/exhibitions/4-remastered>

¹³⁰ Gremma Padley, "The New Exhibition Examining Appropriation in Art", 06 March 2017, [online] "Double Take" was the title of one of these exhibitions displayed at *Skarstedt Gallery in London from March 7 until April 22, 2017, where contemporary artists presented their work imitating the "Pictures Generation" from their own "fresh" point of view, resurrecting issues of originality and authenticity*. Available at: <https://www.anothermag.com/art-photography/9602/the-new-exhibition-examining-appropriation-in-art> [Accessed 12 Nov. 2019].

¹³¹ Jean-Philippe Uzel, "Artistic Appropriation Versus Cultural Appropriation", "Appropriation Panel Discussion", "Esse" No 97, Fall 2019, 16-19; 63-65, Catherine Sinclair, "Michele Provost", "Esse" No 97, Fall 2019, 88-91.

¹³² see Art Catalogue Art Paris, Art Fair, 2018 pp. 226-227, 276-277, 310-311, 362-363, 370-371, 376-377, 384-385.

proves the expansion of demand for appropriation artworks. Prestigious auction houses such as Sotheby's, Christie's, Phillips, Bonhams and Dorotheum¹³³ (Fig. 37) compete in order to dominate each other, emphasizing on the dissemination of appropriation art¹³⁴. In addition, in global art scene, celebrated art collectors manifest strong purchasing interest for artworks "resonating" appropriation and starring art galleries¹³⁵ (Fig. 38), such as Opera Gallery, Saatchi and Marian Goodman enhance constantly the supply in relevant works¹³⁶ (Fig. 39).



Figure 37: Andy Warhol, (1978). *Judy Garland and Liza Minelli*. [synthetic polymer and silkscreen ink on canvas, 101.5 x 101.5 cm framed] [online] Retrieved from: <https://www.dorotheum.com/en/l/6210889/> [Accessed 07 Nov. 2019].

¹³³ For instance, in recent auction at 5-6 June 2019 at Dorotheum auction house, an artwork by Andy Warhol, "Judy Garland and Liza Minelli", 1978, was estimated: Euro 280,000 - to Euro 420,000, And it finally was Realized at Euro 479,100.- USD 530,000 (included charges and taxes). [online] Available at: <https://www.dorotheum.com/en/l/6210889/> [Accessed 16 Nov, 2019]; See also *Frieze* No. 203, May 2019, pp. 121, 119; See Figure 37.

¹³⁴ see Christie's Magazine. "Warhol, The second coming", September - October 2019, pp. 30-33.

¹³⁵ The prestigious art gallery Artvera's in Geneva, has displayed the last "trend" in appropriation art presenting the Korean Artist *Kim Dong Yoo*, with his distinctive artistic practice consisting of painting thousands of tiny images of the same picture, small identical pixelized pieces combined to a unified unit in order to create the portrait of a celebrated person such as Marilyn Monroe, Kennendy, Diana etc. [online] Available at: <http://www.artveras.ch/artists/kim-dong-yoo>; See also Figure 38.

¹³⁶ For instance, in November 2019, the famous Opera art gallery in Singapore, announced the exhibition of the contemporary Spanish artist Lita Cabellut, with the title "The echo of the Masters", which definitely combines the past artistic elements with her own artistic inspiration. Lita Cabellut. "The echo of the masters". [online] Available at: <https://www.operagallery.com/lita-cabellut-the-echo-of-the-masters-singapore-solo-exhibition-2019/> See also Figure 39.

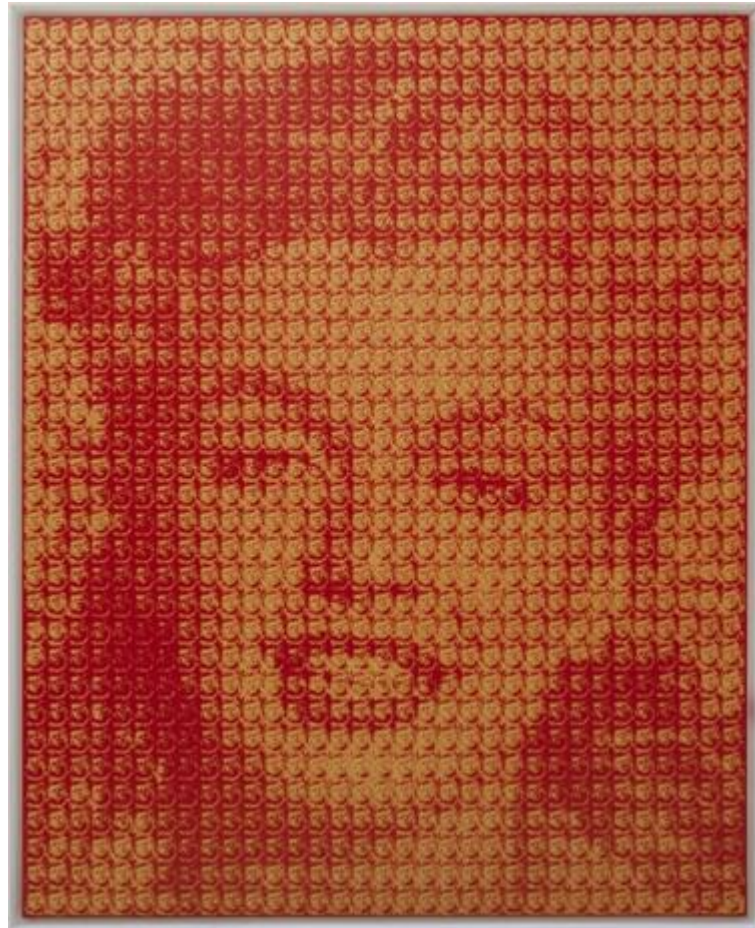


Figure 38: Kim Ding Yoo, (2016) *Marilyn Monroe (John F. Kennedy)*, [Oil on canvas 162 x 130 cm] [online] Retrieved from: <http://www.artveras.ch/artists/kim-dong-yoo/featured-works?view=slider#3> [Accessed 07 Nov. 2019].



Figure 39: Lita Cabellut (2019). *Frida, Tierra Ardiente*. [Paintings, mixed media on canvas, 39.5 x 79 in. (100.3 x 200.7 cm.).] [online] Retrieved from: <http://www.artnet.com/artists/lita-cabellut/frida-tierra-ardiente-a-cTuUjw3dWCvFh2125leMTg2> [Accessed 07 Nov. 2019].

Concluding this chapter, it became clear that appropriation practice has spread to such an extent that has overwhelmed every aspect of contemporary art market engulfing financial dimensions. However, the aforementioned growing creation of appropriation artworks lurks many legal dangers, as far as it is potential other artist's (author's) rights to be violated. The next chapter provides an animated analysis of Copyright's embroilment to the doubtful texture of appropriation art.

III. THE INTERFERENCE OF COPYRIGHT LAW ON APPROPRIATION ART

In this chapter, at a first level the paper addresses the way Copyright Law is involved in Appropriation Art, as far as the nature itself of this practice undermines the fundamentals of Copyright Law, raising legal issues (Landes).¹³⁷, ¹³⁸ The next level discusses the legal concept of “fair use” doctrine, as the ultimate legitimate defense, posing limitations to the author’s exclusive rights. Apart from that clarification, in the third level, a comparative investigation illuminates the legal approach of appropriation art through the prism of the most important provisions, under the International, Regional and National Law.

3.1. Copyright and Appropriation Art: A Condition of “Necessity”

It is generally accepted that Copyright Law comprises the legal ground for the protection of authors’ rights to their original works¹³⁹, granting them with a bundle of exclusive rights. Of course, that legal “monopoly” derives from the fundamental goal of Copyright orientated to the promotion of creativity, with the ultimate benefit for the public, as the U.S. Constitution defines in article 1 section 8¹⁴⁰, ¹⁴¹. Actually, according to Leval, Copyright is “*designed to stimulate activity and progress in the arts for the intellectual enrichment of the public*”¹⁴² (Leval).

¹³⁷ William M. Landes, “Copyright, Borrowed Images and Appropriation Art: An Economic Approach” (December 2000). *U Chicago Law & Economics*, Olin Working Paper No. 113. (December 2000):1-3. [online] Available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=253332

¹³⁸ William M. Landes, Richard A. Posner, *The Economic structure of Intellectual Property Law* (Belknap Press of Harvard University Press, 2003), 261.

“From the perspective of copyright law the very term “Appropriation Art” is a provocation; “appropriation” of protected works connotes stealing”.

¹³⁹ see 17 U.S.C. § 102 Circular 1 Copyright Basics.

¹⁴⁰ Elizabeth Winkowski, “A Context-Sensitive Inquiry: The Interpretation of Meaning in Cases of Visual Appropriation Art”, 12 *J. Marshall Rev. Intell. Prop. L.* 746 (2013): 748-749, [online] Available at: <https://repository.jmls.edu/cgi/viewcontent.cgi?article=1313&context=ripl> [Accessed 10 Dec. 2019].

¹⁴¹ The Constitution of the United States in Article 1, Section 8, states that the Congress has the authority “to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries”. [online] Available at: <https://constitutioncenter.org/interactive-constitution/article/article-i> [Accessed 05 Dec. 2019].

¹⁴² Pierre N. Leval, “Commentaries Towards a Fair Use Standard”, 103 *Harv. L. Rev.* 1105, (1989-1990): 1107-1109, [online] Available at: <http://www.pijip.org/wp-content/uploads/2015/11/103HarvLRev.pdf> [Accessed 07 Jan. 2020].

Not to mention that every produced work, upon its creation, is entitled to be subject of the protective Copyright status. More particularly, pursuant to the relevant statutory provisions (according to each legal regime), the copyright owner can enjoy the exploitation of his work exercising a variety of component rights¹⁴³, such as to authorize its reproduction, to create derivative works^{144, 145, 146, 147, 148, 149, 150, 151} to distribute, display and perform them publicly, while on works of visual arts he can employ his/her moral rights of integrity and attribution. The copyright owner is eligible not on-

¹⁴³ 17 U.S.C. §106, § 106A,

¹⁴⁴ *ibid.* §101, 106§2

¹⁴⁵ J.A.L. Sterling, *World Copyright Law* (Sweet & Maxwell, 2001), 209, 320-321.

17 U.S.C §101 provides a comprehensive definition of derivative works. The production of a secondary work is demonstrated on the basis of a pre-existing original one. Among the named transformations entitled protection there are included also the art reproductions; works of appropriation art, as far as it is considered “derivative” work may be eligible for protection to the extent they are original.

¹⁴⁶ see Circular 14 U.S. Copyright Office. Copyright in Derivative Works and Compilations. [online]

“A typical example of a derivative work received for registration in the Copyright Office is one that is primarily a new work but incorporates some previously published material. This previously published material makes the work a derivative work under the copyright law. To be copyrightable, a derivative work must be different enough from the original to be regarded as a “new work” or must contain a substantial amount of new material. Making minor changes or additions of little substance to a preexisting work will not qualify the work as a new version for copyright purposes. The new material must be original and copyrightable in itself. Titles, short phrases, and format, for example, are not copyrightable. The statutory definition is incomplete and the concept of derivative work must be understood with reference to explanatory case law. Three major copyright law issues arise concerning derivative works: (1) what acts are sufficient to cause a copyright-protected derivative work to come into existence; (2) what acts constitute copyright infringement of a copyright in a copyright-protected work; and (3) in what circumstances is a person otherwise liable for infringement of copyright in a copyright-protected derivative work excused from liability by an affirmative defense, such as first sale or fair use?” Available at: <https://www.copyright.gov/circs/circ14.pdf> (Accessed 29 Nov. 2019)

¹⁴⁷ Deborah E. Bouchoux, *Intellectual Property, The Law of Trademarks, Copyrights, Patents, and Trade Secrets* (Delmar Cengage Learning, 2009), 192-193.

“It is important to understand that a derivative work refers to the work as a whole, and not just to the modifications. Another basic principle applicable to derivative works provides that “the copyright in a derivative work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.” 17 U.S.C. §103(2). The preexisting material in the original work is part of the derivative work, but the copyright in the derivative work extends only to the material contributed by the author of the derivative work, as distinguished from the preexisting material employed in the work. 17 U.S.C. §103(2). It’s important to keep in mind that the preexisting material employed in the derivative work is part of the copyrighted derivative work as a whole, but the copyright owner of the derivative-work copyright does not obtain exclusive copyright rights in the preexisting material”.

¹⁴⁸ George Koumantos, *Copyright, Derivative Works* (from greek) (Ant. N. Sakkoulas Publishers, 2002), 136-139.

¹⁴⁹ Brett D. Rhodes, *Copyright Law and a brief look at the google library project* (Nova Science Publishers, 2010), 20-25.

¹⁵⁰ Daniel Gervais, “The Derivative Right, or Why Copyright Law Protects Foxes Better than Hedgehogs”. [online] Available at: <http://www.jetlaw.org/wp-content/uploads/2013/05/Gervais.pdf> (Accessed 12 Dec.2019).

¹⁵¹ Steven D. Anderman, *The Interface between Intellectual Property Rights and Competition Policy* (Cambridge University Press, 2007), 148.

ly to exercise the aforementioned rights, but he is entitled also to authorize these rights and prohibit others from exercising these rights.

Since not every kind of work qualifies for protection, it is crucial to clarify that eligible works for works to appertain to the legal “umbrella” of Copyright are only the original ones.¹⁵² As long as the evident diversity in jurisdictions impedes a uniform “approach” of originality’s concept,¹⁵³ its interpretation usually is shaped by the case law. The “originality” criterion, the “core” of Copyright protection, under the common law countries prism¹⁵⁴ is related to the individuality of the work, demonstrating a modicum of creativity.^{155, 156, 157, 158, 159} For instance, in *Feist Publications, Inc., v. Rural Telephone Service Co.*, 499 U.S. 340 was dictated that originality is distinguished from the “first”, the novelty or the aesthetic criteria.^{160, 161} Under European Union legisla-

¹⁵² 17 U.S.C. § 102 (a).

¹⁵³ Sterling, supra note 145, at 441-442.

The interpretation of “originality” standard depends on each country’s legal system. Therefore, countries such as United States, United Kingdom and others connected historically with the British Copyright legal system (e.g. Israel), Canada and Australia, employ a low threshold of originality, paying attention to the labor, skill, investment and effort itself. These countries belong to the common law regime which sets the “work” in the centre of interest, grants the labor and externalizes an entrepreneur friendly profile”.

¹⁵⁴ See also, Marinos Michael - Theodoros. Copyright, (in greek) Ant. N. Sakkoulas, 2004, p. 19. On the other hand, in civil law jurisdictions, meaning the countries of continental Europe, African countries and countries of Central and South America, there is an emphasis on human factor, insofar the author is in the centre of protection, based on the concept of “droit d’ auteur” The adherents of the latter doctrine support the need of a modicum of creativity implicating the intellectual effort and the specific ingenuity of the author”.

¹⁵⁵ Bouchoux, supra note 147, at 182-183.

¹⁵⁶ Graham, Dutfield, Graham - Suthersanent, Uma. *Global Intellectual Property Law* (Edward Elgar Publishing Limited, 2008), 80.

“Originality” in most jurisdictions presumes some level or input of authorial personality, if only it be shown that the work was not copied, but “originated” from the author (p. 80).

¹⁵⁷ See Marinos, supra note 154, at 78-79.

¹⁵⁸ Elizabeth Winkowski, “A Context-Sensitive Inquiry: The Interpretation of Meaning in Cases of Visual Appropriation Art”, 12 *J. Marshall Rev. Intell. Prop. L.* 746 (2013): 749 [online] Available at: <https://repository.jmls.edu/cgi/viewcontent.cgi?article=1313&context=ripl>

¹⁵⁹ see, e.g., Court of First Instance (Single member), Athens, Decision No. 1428/2019, *Greek Corporate Law Review*, Book O’, 2019, Issue 2d, pp. 457-472; See also, Supreme Court (Areios Pagos), Athens, Decision No. 919/2007, (p. 458). (According to the ruling Greek case law the notion of “originality” is identified with the estimation that “a work meets the requisite criteria of protectability if another author, under similar circumstances and with the same aim in mind, would not reasonably reach the same creative outcome or if the work at issue presents an individual particularity or a modicum of creativity, such that the work can be distinguished from everyday productions or from other similar and known works”).

¹⁶⁰ Olga D .Garoufalia, *Artistic works and Their Legal Protection* (Private Law Studies), Law & Economy, Sakkoulas Publications, (2001), 30-38.

“Especially in artistic works the originality prerequisite derives from the specific different way of creation which incorporates a unique narration according to the artist’s personality. There is no connection of originality with the “new” work that no one has occupied before with the same issue”.

tion,¹⁶²,¹⁶³ (see Infopaq) originality criterion was shaped in the sense of being its author own independent intellectual creation, after the performance of free and creative choices that “stamp” the author’s personality. The element of “originality” as a sine qua non of Copyright assures that only the creative expression is protected. Ideas and simple facts are excluded from copyright protection¹⁶⁴ in the basis of the Copyright Law axiom that derives from the dichotomy between ideas and expression of ideas.¹⁶⁵,

¹⁶⁶,¹⁶⁷,¹⁶⁸,¹⁶⁹

Regarding the works of appropriation art,¹⁷⁰ due to their peculiar nature to originate from antecedent works employing copyrighted material, either entirely or partly, without the prior permission of the copyright owner, the potential infringement of the initial owner’s exclusive rights always lurks. However, the appropriation artist might surmount the arising legal troubles demonstrating the originality of his work in a substantial transformative way.¹⁷¹ Under the “fair use” doctrine, the statutory limita-

¹⁶¹ Krisna Hariani & Aniruth Hariani. “Analyzing “Originality” in Copyright Law: Transcending Jurisdictional Disparity”, (21 June 2011), 509 [online] Available at: https://ipmall.law.unh.edu/sites/default/files/hosted_resources/IDEA/idea-vol51-no3-krishna-hariani-anirudh-hariani.pdf [Accessed 29 Nov. 2019]

“Under that spectrum, U.S. Copyright Act has determined that originality needs to manifest a modicum of creativity, a kind of independent creation”.

¹⁶² Infopaq International v. Danske Dagblades Forening, Case C-5-08, July 16, 2009 (ECJ) [online] Available at: <https://h2o.law.harvard.edu/collages/24450>;

¹⁶³ Eleonora Rosati, *Originality in copyright: a meaningless requirement?*, (09-05-2018), [online] Available at: <http://ipkitten.blogspot.com/2018/05/originality-in-copyright-meaningless.html> (Accessed 21 Nov. 2019)

¹⁶⁴ 17 U.S.C. § 102 (b)

¹⁶⁵ David R. Koopsell, *The Ontology of Cyberspace, Law, Philosophy and the future of Intellectual Property* (Open Court, Chicago and La Salle, Illinois, 2000), 53.

¹⁶⁶ Sterling, supra note 145, at 190;

¹⁶⁷ George Koumantos and Irini Stamatoudi, *Greek Copyright Law* (Sakkoulas Publications, 2014), 25, 27.

¹⁶⁸ Labros E. Kotsiris and Irini A.Stamatoudi, *Intellectual Property Law*, (from greek) (Sakkoulas Publications, 2012), 28-31.

¹⁶⁹ see also: Theodoros Stigas, *Copyright Comments - Case Law*, (Nomiki Bibliothiki, 2003), 33, 203-254, (from greek). “The principle of idea/expression dichotomy penetrates the Copyright Law and finds its articulation in the following provisions: According to article 2 of the Berne’s Convention, the subject matter of protection is directed to the work itself, irrespective of its form or its way of creation. The fixation of the work is protected and the ideas are excluded”. See also Marinos, supra note 154, at p. 71. In the case of the Greek Copyright Act there is the following statement in article 2 par. 3: “...only the expression in any form is protected and not the underlying ideas”.

¹⁷⁰ Landes, supra note 138, at 260-261.

According to Landes: “Appropriation Art” is a provocation; “appropriation” of protected work connotes stealing.

¹⁷¹ Jennifer Gregor and Mark Hancock, “Appropriation as Art: The Arts and Copyright Fair Use”, 01 May 2016, Wisconsin Lawyer <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=89&Issue=5&ArticleID=24816> (Accessed 02-12-2019)

tion to the author's exclusive rights that governs the "spirit" of the U.S. Copyright Act of 1976, the appropriator can build effectively his defense. In the next lines a rigorous analysis of "fair use" principle will highlight its significance on debilitating the legal consequences in case of Copyright infringement.

3.2. Fair Use Doctrine

In order to balance the conflict between the society's interest for the promotion of free flowing ideas and knowledge (in science and arts) and the individual holders' rights, the Law conceived a way to benefit the users allowing access to copyrighted material in certain limited circumstances, without asking for the owner's authorization.¹⁷² The "Fair Use" doctrine^{173, 174} a feature of United States law - was firstly conceived and articulated by the Courts and it was eventually enacted as Section 107 of the U.S. Copyright Act as a conditional right and affirmative defense to potential infringement claims.^{175, 176} Applying the Fair Use "privilege", the law inaugurates an exemption which activates only as defense in "alarm" cases of Copyright's violation. If we want to be more emblematical, we could describe "fair use" as an "escape" from the legal monopoly of the exclusive rights protection.

According to 17 U.S. Code § 107 the acceptable "fair use" principle is established under specific cases diminishing copyright by granting allowance to certain activities such as comment, parody, criticism, news reporting and academic research, which

"The transformative use test has come to dominate the legal analysis of appropriation in all artistic disciplines".

¹⁷² Steven D. Anderman, *The Interface between Intellectual Property Rights and Competition Policy*, (Cambridge University Press, 2007), 149-152; supra note 145 at 364-365.

¹⁷³ Tom W. Bell, *Intellectual Privilege, Copyright, Common Law and the common Good* (Mercatus Center, George Mason University, Arlington, Virginia, 2014, 2d. 2018, 113-120, [online] Available at: <https://www.mercatus.org/system/files/bell-copyright-law-web-2018.pdf> [Accessed 22 Nov. 2019].

¹⁷⁴ Stephen Fishman, *Copyright Handbook, The: What every writer needs to know* (Nolo, 2017), 150.

¹⁷⁵ Patricia Aufderheide, "Expanding the Utility of Fair Use in Copyright: The best practice model", *Amsterdam Law Forum*. [online] Available at: <http://amsterdamlawforum.org/article/view/102/181> [Accessed 26 Nov. 2019];

¹⁷⁶ Karen L. Jones, "Still Fair After All These Years? How Claim Preclusion and Issue Preclusion Should Be Modified in Cases of Copyright's Fair Use Doctrine". *UKLA Law Review*, (27 April 2011): 1078-1083. [online] Available at: <https://www.uclalawreview.org/still-fair-after-all-these-years-how-claim-preclusion-and-issue-preclusion-should-be-modified-in-cases-of-copyrights-fair-use-doctrine/> (Accessed 03 Dec. 2019).

otherwise would set an infringement.¹⁷⁷ In these cases, the Court has to follow its evaluation based separately upon a set of four key (non-exclusive) factors weighting each time whether the prerequisites are met.¹⁷⁸

The concept of “Fair Use” doctrine is indissolubly connected with the U.S. Copyright Act policy. Limiting in a certain justifying way the exclusive owner’s rights, the horizon of free expression broadens and a diverse cultural boost is accelerated. Afterwards, on the one hand a part of the basic goals of Congress policy is achieved¹⁷⁹, but on the other hand, the preservation and control of owners’ rights in (exploitation of their original works) is limited and sometimes is being threatened dramatically. The implementation of “fair use” is not arbitrary, but it applies upon the overall perception of the strict particular elements that the Judge would take into consideration each time, on a case-in-case¹⁸⁰ basis.¹⁸¹, ¹⁸² Prior to the four factors test analysis, it is necessary to clear out that “fair use” is applicable only in copyrighted protectable works and in cases that have not fallen to the public domain.

17 U.S. Code § 107 provides that: “the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

¹⁷⁷ Steven J. Frank, *Intellectual Property for Managers and Investors, A Guide to evaluating, Protecting and Exploiting Intellectual Property* (Cambridge University Press, 2006), 19-21.

¹⁷⁸ Stanford University Libraries. Stim Rich, “Measuring Fair Use: The Four Factors”, [online] Available at <https://fairuse.stanford.edu/overview/fair-use/four-factors/>; see also Report, “Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Visual Arts Communities: An Open Letter from the College Art Association”, (February 2014), 15-18.

¹⁷⁹ see U.S. Constitution article I, § 8, cl. 8. “The Congress shall have Power to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries”. [online] Available at: <https://www.law.cornell.edu/constitution/articlei>

¹⁸⁰ E. Demarsin, E.J.H. Schrage, B. Tilleman, & A. Verbeke, *Art & Law* (die Keure, 2008), 161.

¹⁸¹ *ibid.* 179, cases pp. 21-22. Copyright, Permissions, and Fair Use among Visual Artists and the Academic and Museum Visual Arts Communities: An Open Letter from the College Art Association. Cases pp. 21-22. [online] Available at: <https://www.collegeart.org/pdf/FairUseIssuesReport.pdf>

¹⁸² see “Fair Use”, Columbia Universities Libraries [online] Available at: <https://copyright.columbia.edu/basics/fair-use.html>

- (2) the nature of the copyrighted work;*
- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and*
- (4) the effect of the use upon the potential market for or value of the copyrighted work.*

*The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors”.*¹⁸³

Initially, the Judge has to examine the purpose and the character of the use, including the non-commercial use. In realistic terms the meaning behind the first factor is whether a work demonstrates creativity (Okpaluba).¹⁸⁴ The court decisions are usually orientated to the first factor in order to determine whether and to what extent a work is “transformative” enough to give a “new” perception - approach, narration or aesthetics. The first statutory factor paying attention to the “different” purpose from the initial one, plays an important role in the field of visual arts and more specifically in appropriation art practice, where usually the distinction between the primary work and the derivative is ambiguous. The justification of a mere reproduction of a previous work does not cover the requisites of fair use. The “transformative” character of the secondary work, providing a new insight of the prior (work) or a further purpose usually is challenging and the degree of that transformation determines whether the copying will work in the defendant’s favor.

During the last decades, in cases of pictorial - artistic works the determination of the Judge was based on the dominant “transformative” use of the new produced work. The milestone case for the adoption of the “transformative” model was the US Supreme Court’s decision *Campbell v. Acuff-Rose Music, Inc.*¹⁸⁵, ¹⁸⁶ which broadened the limits of the first fair use factor and marked the beginning for the federal courts to exercise more extensively the “transformative” criterion in cases of secondary works,

¹⁸³ see 17 U.S.C. § 107

[online] Available at: <https://www.copyright.gov/title17/92chap1.html>

¹⁸⁴ Johnson Okpaluba, “Appropriation Art: Fair Use Or Foul? Dear Images: Art, Copyright and Culture”, London: (2002), 204, [online] Available at: https://www.academia.edu/2943181/Appropriation_Art_Fair_Use_Or_Foul

¹⁸⁵ *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994).

[online] Available at: <https://www.law.cornell.edu/supct/html/92-1292.ZO.html>

¹⁸⁶ Jennifer Gregor and Mark Hancock, “Appropriation as Art: The Arts and Copyright Fair Use”, (01-05-2016). [online] Available at: <https://www.wisbar.org/NewsPublications/WisconsinLawyer/Pages/Article.aspx?Volume=89&Issue=5&ArticleID=24816> [Accessed 02 Dec. 2019].

reassuring fair use defense in many cases (see Cariou).¹⁸⁷ In *Campbell*, the Court declared distinctively that: *“the transformative use concept asks whether the copy adds something new, with a further purpose or different character, altering the first (work) with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is ‘transformative’”*.

Incidentally, the nature of the copyrighted work must be considered thoroughly, studying for example whether a copyrighted material confines in the educational or entertainment field. Most of times, the characteristics of a work might seal the application of the fair use principle. There is a court’s tension to be more positive on fiction works such as art, film and music, a fact that underlines the interplay of copyright protection with creativity. So, the more creative a work is, the more protection requires.

The third factor must be distilled into the question “in which amount extended the copyrighted material”, which highlights the relation of the amount work really copied with the particular substantial use. In that case, both the qualitative and quantitative elements are considered in order to determine and excuse the fair use defense. The portion of the work used any time must be subject to the question of being a pivotal element of the work. If the reproduced portion of the work constitutes the “heart” - the most substantial and memorable part of the copyrighted work, then the fair use defense is rejected.¹⁸⁸ So, the less use of a copyright protected work leads to less possibilities of being subject to infringement.

In the fourth level we deal with the most crucial factor that indicates fair use, the “market effect”. The effect of the use on the potential market consists the Courts’ most significant, fundamental parameter in the determination of fair use.^{189, 190} The market effect presupposes an investigation of the potential market, which might mark *“the reasonably work’s availability for selling or licensing”*.¹⁹¹ If a copyrighted work deprives the owner of future revenue, this could reject the fair use application despite the “transformative” way of the work¹⁹². For example, in *Rogers v. Koons*, 960 F.2d 301

¹⁸⁷ see *Cariou v. Prince*, No 11-1197 (2d Cir. 2013) [online] Available at: <https://law.justia.com/cases/federal/appellate-courts/ca2/11-1197/11-1197-2013-04-25.html>

¹⁸⁸ Bouchoux, supra note 147, at p. 263.

¹⁸⁹ Okpaluba, supra note 184, at 206.

¹⁹⁰ supra note 155, at 93.

¹⁹¹ *ibid.*

¹⁹² Bouchoux, supra note 147, at 263.

(2d Cir. 1992), where the produced sculptures were based on copyrighted photograph material without the owner's consent and were sold for million dollars, the Court rejected the defendant's fair use argument applying the potential market's effect factor¹⁹³. Therefore, it is clear that the fourth factor emphasizes on the economic impact of the new work in relation to the original.

The assessment of "fair use" under the four factors test is often vague and nebulous, resulting sometimes to antithetical judicial determinations (see cases).¹⁹⁴ Apart from the analysis above, it would be also advisable to assess the weighty opinion of the notable Judge Pierre Leval of the United States Court of Appeals for the Second Circuit regarding fair use in Copyright cases.¹⁹⁵ Undoubtedly, the honorable Judge discerned the difficulty to distinguish each time the thin line between transformative use that can result in fair use application and those that result in derivative works. I suppose that Judge Leval trying to deepen to the core of meaning and purpose of "transformative" expressions, he actually stabilized the basis for the justification of the fair use parameter in cases of secondary works.

¹⁹³ see *Rogers v. Koons*, 960 F.2d 301 (2d Cir. 1992)

¹⁹⁴ Barry Werbin, "The Transformation of Fair Use After *Prince v. Cariou*", *Art & Advocacy*, Volume 16. (February 2014), [online] Available at: <http://www.herrick.com/publications/the-transformation-of-fair-use-after-prince-v-cariou/> [09 Jan. 2020].

In the similar judicial path with *Campbell*, allowing the first fair use factor of transformative use was also the well-known *Cariou v. Prince*. After having been rejected by the district court, the final opinion of the Second Circuit dictated that the majority of the disputed copyright infringed works (25 of 30) were entitled to fair use principles, relying on the decisive criterion of "transformation". It would be an omission the reference to famous cases having involved the most controversial artist of our era, the American Jeff Koons, in which the latitude of judicial discretion was expansive. For instance, in *Rogers v. Koons*, 960 F. 2d 301 (2d Cir. 1992) and in *United Feature Syndicate v. Koons*, 817 F. Supp. 370 (S.D. N.Y. 1993) the Court disagreed about the transformative use of the secondary disputed works; while on the contrary, in *Blanch v. Koons*, 467 F. 3d 244 (2d Cir. 2006)- it accepted the transformative use; see also Megan Richardson and Sam Ricketson, "*Research Handbook on Intellectual Property in Media and Entertainment*", Edward Elgar Publishing, 2017, 105-114.

¹⁹⁵ Pierre N. Leval, "Toward a Fair Use Standard". *Harvard Law Review* 103, no. 5 (1990): 1105-1113. (p. 1111) [online] Available at: <http://www.pijip.org/wp-content/uploads/2015/11/103HarvLRev.pdf> [Accessed 09 Jan. 2020],

The prominent Judge has argued in his seminal article that: "The use must be productive and must employ the quoted matter in a different matter or for a different purpose from the original...If the secondary use adds value to the original - if the quoted matter is used as raw material, transformed in the creation of new information, new aesthetics, new insights and understandings - this is the very type of activity that the fair use doctrine intends to protect for the enrichment of society".

3.3. The Subsumption of Appropriation Art in the Legal Framework of International, Regional and National Copyright Law.

3.3.1. The Berne Convention for the Protection of Literary and Artistic Works.

During the years, the international necessity of elaborating an effective mechanism for the protection of Intellectual Property opened to the adoption of the historical Berne convention. The leading international Copyright treaty was held in Bern, Switzerland, it came into existence in 1886 and it was amended at Paris in 1979.¹⁹⁶ The ratification of the Berne Convention has become from 187 participatory states¹⁹⁷ and its administration has been consigned to the World Intellectual Property Organization (WIPO). The preamble familiarizes the reader with the basic convention's mission mounting from the aim to secure efficiently and in a uniform way the literary and artistic works and the rights of their authors, as explicitly stated in article 1.^{198, 199} Meanwhile, the treaty refers to the basic principles^{200, 201} of eligibility, defines the protected works and the authors' rights, the particular cases of rights granted protection and other cases that can be subject of limitations and free uses²⁰². The principle of "national treatment"²⁰³ pierces clearly the Convention, establishing a kind of uniformity.²⁰⁴

¹⁹⁶ WIPO, Chapter 19 "The Berne Convention for the Protection of Literary and Artistic Works" in *Introduction to Intellectual Property: Theory and Practice* (Kluwer Law International, 1997, reprinted 1998), 385-394.

"The Berne Convention is the oldest international treaty in the field of Copyright. It is open to all states".

¹⁹⁷ WIPO-Administered Treaties [online] Available at: https://www.wipo.int/treaties/en/ActResults.jsp?act_id=26 [Accessed 05 Dec. 2019].

¹⁹⁸ see Berne Convention for the Protection of Literary and Artistic Works (1886), as amended on September 28, 1979, [online] Available at: https://www.wipo.int/treaties/en/text.jsp?file_id=283698; See also Guy Tritton, Richard Davis, Michael Edenborough, James Graham, Simon Malyhisz, Ashley Roughten, *Intellectual Property in Europe*, London, Sweet & Maxwell, (2002), 306-314.

¹⁹⁹ Catherine Seville, *EU Intellectual Property Law and Policy*, Edward Elgar Publishing, (2009), 9-13.

²⁰⁰ Berne Convention Basics. [online] Available at: <https://us.eversheds-sutherland.com/portaresource/lookup/poid/Z1tOI9NPluKPtDNIqLMRV56Pab6TfzcRXnckbDtRr9tObDdEuSZDo0!/fileUpload.name=/BerneConvention.pdf> [Accessed 05 Dec. 2019].

²⁰¹ Michael C. Denniston, "International Copyright Protection: How Does It Work?" (29 March 2012) [online] Available at: <https://www.bradley.com/insights/publications/2012/03/international-copyright-protection-how-does-it-w> [Accessed 28 Nov. 2019].

²⁰² Claude Masouye, "Guide to the Berne Convention for the Protection of Literary and Artistic Works" (Paris Act, 1971), WIPO, 1978. [online] Available at: https://www.wipo.int/edocs/pubdocs/en/wipo_pub_615.pdf

²⁰³ Bouchoux, supra note 147, at 308-310.

²⁰⁴ William Cornish & David Llewelyn, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (London: Sweet & Maxwell, 2000), 360.

Regarding the protective framework of Berne Convention there is not a clear provision in relations to appropriation art. Nevertheless, the leading Convention stipulates indirectly that appropriation art grants for protection, if we consider each time the nature, the purpose and the specific use of appropriation art works. Since there has been identified a distinction among these works clarifying them either as derivative or as reproductions (Gervais),²⁰⁵ the respective provisions could be applied.

Initially, a glance at article 2§1 provides a guide about the protected works. The relative provision governs indicatively and non-exhaustively the categories of (protected) works, based on every original production “*in the literary, scientific and artistic domain, whatever may be the mode or form of its expression...architecture or science*”.²⁰⁶ Pursuant to this provision, the “artistic work” is eligible for protection, including -among the others- works such as drawings, paintings, photographs, sculptures and photographic works.

Afterwards, article 2§3 addresses what is customary to be called derivative works, namely the works based on earlier, pre-existing ones.²⁰⁷, ²⁰⁸ The treaty confers copyright protection upon the author of such a work, insofar as it is original. So, under the potential prerequisite of originality, a work of appropriation if considered derivative, it grants for copyright protection; However, that kind of protection does not affect the protection of the primary original work. Additionally, appropriation works incorporating usually modifications, might be subject to article 6bis which illustrates the moral rights of paternity and integrity in the authors works; the author is entitled to

²⁰⁵ Gervais, supra note 150, at 800-801.

²⁰⁶ Berne Convention, supra note 196,198, 202 at 2§1.

²⁰⁷ *ibid.* at 2§3.

“Translations, adaptations, arrangements of music and other alterations of a literary or artistic work shall be protected as original works without prejudice to the copyright in the original work”.

According to Masouye Guide to the Berne Convention, article 2§3 defines the derivative works as copyright protected.

2.13. This paragraph deals with what are often called derivative works i.e., those based on another, pre-existing, work. The Convention provides for their protection as original works since their creation calls for intellectual effort.

2.16. This paragraph also covers arrangements of music and generally all other alterations of literary and artistic works. Of course, the protection that these works enjoy is without prejudice to the copyright in the originals: in other words, in order to translate, adapt, arrange or alter a protected work, the consent of the author is needed, unless, of course, the work is in the public domain.

²⁰⁸ Sterling, supra note 146 at 418-419 & 757.

“Adaptation is analyzed as the act of adapting a protected work (which will be an infringement unless authorized) and the adaptation itself, which may have a separate copyright/author’s right if original must be distinguished” (p. 757).

claim the authorship of the work and oppose to certain actions that manifest lack of “respect” to the work and could prejudice his honor or his reputation.²⁰⁹

On the contrary, if a work of appropriation is considered a reproduction, then the statement of article 9§1 recognizes to the author of the artistic work the exclusive right of authorization the reproduction of such a work.²¹⁰ However, article 9§2 inserts a potential exemption to the aforementioned right, permitting the reproduction of works in particular cases, based on the discretion of each country’s legal regime, insofar two cumulative conditions are met: “the reproduction must *not conflict with a normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the author*”. Note well that pursuant to article 10§§2,3 based on each country’s legislative discretion, there is an exceptional provision to the author’s reproduction right, allowing the free use of artistic works incorporated in the way of illustration in publications, for teaching purposes, seeing that such a use is not incompatible with the purpose and has been exercised with fair practice; making always a relative citation to its author (moral right of paternity).²¹¹ Concluding, appropriation art might find implementation under the provision of article 12 which dictates protection to adaptations, alterations and arrangements, interconnecting it with article 2§3 concerning the protection of derivative works²¹².

3.3.2. Directive 2001/29/EC of the European Parliament on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society

During the last years, in European Union region there has been a systematic attempt to insure a common Copyright system establishing a kind of harmonization in Copyright Law. The main impetus behind the modernization of Copyright Law in a European level was grounded in the effort to maintain a balance between the flow of information in the modern societies and the function of internal market.²¹³ The legislative disparities arising contextually from each Member State there were always an obstacle

²⁰⁹ Berne Convention, supra note 198, 202 at art.6bis.

²¹⁰ ibid at art.9§1,2.

²¹¹ ibid. at art.10§2,3.

²¹² ibid. at art.12.

²¹³ Okpaluba, supra note 184, at 207-208.

towards the direction of Copyright harmonization. However, under the guidance of diverse legal instruments, such as the “green papers” providing recommendations and the codification of mandatory rules of Directives,²¹⁴ the E.U. Copyright regime seems to have changed drastically (Margoni).²¹⁵

Towards to the direction of harmonization, in 2001 the Information Society Directive (2001/29/EC) came to force posing the basis for the uniformity in certain aspects of Copyright Law in the digital milieu to all EU Member States.²¹⁶ Analyzing the regulatory context of the Directive above, it is obvious that its implementation has harmonized inter alia the most important author’s right, the right of reproduction, introducing a bundle of exemptions and limitations upon this.

The beginning of the aforementioned Directive’s provision is based on article 2(a), which stimulates the Member States to exercise the exclusive right of authorization or prohibition a reproduction, direct or indirect, temporary or permanent, by any means, to the author of the work. Besides, pursuant to article 5 of the Directive a list of designated limitations is provided, which might be applied also to the works of appropriation in case of considering them as reproductions. Inter alia, the ruled limitations of article 5 apply optionally (except from article 5§1) in the following instances (Okpaluba):²¹⁷ a) in case of reproductions created with the use of photographic technique, on paper or any other comparable medium, to the extent a fair reward has been offered to the rightholder (article 5§2a), b) in case of reproduction for private

²¹⁴ “What is? Key EU terms”. European Law Monitor [online] Available at: <https://www.europeanlawmonitor.org/what-is-guide-to-key-eu-terms/eu-legislation-what-is-an-eu-directive.html>

A Directive is a form of legislation that is addressed to the Member States, requiring to achieve certain objectives. The Member States must then pass the relevant domestic legislation to give effect to the terms of the Directive within a time frame set in the directive, usually two years.

²¹⁵ Margoni, Thomas. (2016). The Harmonisation of EU Copyright Law: The Originality Standard. *SSRN Electronic Journal*. 10.2139/ssrn.2802327.

²¹⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society. [online] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029>; See also: Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

Directive 2001/29/EC is amended as follows: In Article 5(3), point (a) is replaced by the following: use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790; [online] Available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0790&from=EN>

²¹⁷ Okpaluba, supra note 184, at 207-208.

utilization and non-commercial purpose; a just compensation is imposed (article 5§2(b), c) in case of reproduction for teaching or research aims accompanied by the author's attribution (article 5§3a), without prejudice to the exceptions and limitations provided for in Directive (EU) 2019/790 (2), d) in case of reproduction for criticism or review, granting attribution to the author, 5§3d and e) in case of reproduction for purpose of parody, pastiche or caricature, 5§3k. At last, according to article 5§5, the Directive dictates the specific application of these limitations in cases where do not collide with the normal utilization of the work, and do not operate to the prejudice of the initial right holder's lawful interests.

3.3.3. Greek Law N. 2121/1993 on Copyright, Related Rights and Cultural Matters

In the domestic legal system the Copyright protection is provided through statutory rules.²¹⁸ In case of Greece, the pertinent Copyright Act No 2121/1993²¹⁹ which enacted in 1993, confers upon such protection,^{220, 221} governing the absolute and exclusive rights of the "author", as far as the Greek law belongs to the continental European system.^{222, 223} In Greek Law the protectability of a work is closely related to its originality.²²⁴ The substantive criterion of "originality" derives from the general clause of article 2§1, illustrating as protectable work "*any original creation*".^{225, 226} The Greek Copyright

²¹⁸ Sterling, supra note 145, at 97.

²¹⁹ Greek Copyright Act No 2121/1993. [online] Available at: <https://www.opi.gr/en/library/law-2121-1993>.

²²⁰ George Koumantos and Irini Stamatoudi, *Greek Copyright Law* (Sakkoulas Publications, 2014), 123-208.

²²¹ *ibid.* at 17-18.

²²² Garoufalia, supra note 158.

²²³ Koumantos-Stamatoudi, supra note 220, at 18-20

²²⁴ See a brief analysis of originality criterion. Supra note 220 at 22. Despite the inadequate notion of "original work" in the statute, traditionally, it "must express its author's personality".

Under the EU law concerning computer programs, databases and photographs, the traditional criterion of originality is formulated on the basis of creativity (p.22-23). The aforementioned effect of the creativity criterion applies also to the Greek case law which looks for the author's own personality doctrine, as it is reflected either in the work or in the uniqueness of the work.

The deeper analysis of the previous scheme refers to the state that no one else with the same aim in mind and the same or similar circumstances would have reached the same creative outcome. (supra note 220 at 22-23) The Greek case law provides for example: "a minimal degree of originality", or "relative", or "some", or "originality", or "creative style", or "creative level", or "minimum intellectual author's individuality" (Marinos, supra note 154 at 78-80).

²²⁵ supra note 220, at 22-23.

Act provides protection in an indicative list of works.²²⁷ So, there is the possibility of any other work not listed above to be protectable under Copyright Law insofar it gathers the prerequisites of originality.

Apart from the classic protectable enumerated works, the Greek Law in article 2§2 grants also copyright protection to derivative works, namely the works that are based on or come from preexisting original works after transformation, modification, adaptation or other alterations.²²⁸, ²²⁹, ²³⁰ The wide protection of Greek Copyright Act expands even to unauthorized derivative works, which consist a characteristic example of infringement. Pursuant to article 3 the author of a work is granted with the component right -inter alia- to authorize or forbid the making of new versions of a work, adapting or modifying a work (3§1c). The right of controlling the aforementioned alterations and modifications might be considered also as a moral right of the author, i.e. the right of integrity to the work (4§1).²³¹ Additionally, according to article 4§1b, the author is eligible to be attributed for his work, demanding also his name to be mentioned on the copies of the original.

The exercise of author's rights is subject to certain exceptions and limitations in order broader social needs to be satisfied. According to article 28C all the designated limitations which exclude copyright liability must be in compliance with the "three-step-test".²³² Regarding the subsumption of appropriation art on specific limitations, it is pointed out that:

²²⁶ Marinou, supra note 154, at 77-80. The theory of the "statistically unique", according to the Swiss legal Kummer, as the basic element of originality (77).

²²⁷ supra note 220, at 26-28.

²²⁸ ibid, at 27-28.

²²⁹ Lambros E. Kotsiris and Irini A. Stamatoudi, *Copyright Law* (Sakkoulas Publications, 2012), 56-62. (from greek)

²³⁰ Irini A. Stamatoudi, *Copyright Law, National - European - International Law*. (Nomiki Bibliothiki, 2000), 7 (from greek).

²³¹ supra note 220, at 74, 81-84.

²³² supra note 220, at 90-92.

The "three-step-test" is reflected in the EU Directive for the Information Society and in Berne Convention (art. 9) dictating that only specific uses of works are allowed without requiring the previous author's consent or compensation, which otherwise would be an infringement act, which "don't conflict with the normal exploitation of the work or other subject matter" and "don't unreasonably prejudice the legitimate interests of the author".

The Greek Copyright Act, in order to restrict the copyright liability and to allow exemptions and limitations, it can attract complementary rules from other legal instruments such as the Greek Civil Code, adopting the rule of article 281 regarding the right's "abuse". Under that legal prism, according to article 281 of the Greek Civil Code, the judge aims to diminish the systematic overuse of the rights, posing particular limits that derive from the good faith and the morality.

a) Pursuant to article 18§1,2 the reproduction for private use is permitted, to the extent that does not oppose to the normal exploitation of the work or prejudice the legitimate author's rights. This limitation is excluded mainly in case of fine arts produced by technical means (article 1§2b).

b) Article 21 institutes the limitation to the right of reproduction for educational purposes as concerns *a lawfully published work of visual arts, to the extent that such reproduction is in compliance with the fair practice and justified by the purpose of the use*. The right of attribution to authorship must be respected.

c) Article 28 inaugurates the pivotal right of museums to display their artworks and reproduce them in catalogues, as long as museums have the ownership of the incorporated in physical carriers works. At any case, this reproduction must be compatible *with the normal exploitation of the work and does not unreasonably prejudice its author's legitimate interests*.

Under these circumstances it is evident that Greek Copyright Act does not make a clear reference reducing copyright liability as it is stipulated in the United States and United Kingdom jurisdictions that establish the doctrines of "fair use" and "fair dealing" respectively. In local Greek Copyright Act the copyright protection budges seriously, a fact that proves the legislator's deliberate intention to protect and promote the public interest of education and information.

IV. CASE STUDIES ANALYSIS

In this chapter the paper introduces the readers to actual legal disputes that have concerned the Courts during the past, illustrating the outbreak of appropriation art under the United States Copyright Act, with an emphasis on the vague aspects of fair use dilemma when copyright infringement arises. The springboard to that analysis will be four pivotal cases from the art law litigation involving celebrated contemporary artists, such as Jeff Koons and Richard Prince, whose appropriation practice tends to become a “convention”, involving them in continual legal battles.

4.1. *Rogers v. Koons*^{233, 234, 235}

The first case numbers among the most influential legal battles in the field of Copyright infringement. Besides, the embroilment of Jeff Koons, one of the most widely known and controversial living artists in the realm of contemporary art, especially in the appropriation “strategy”,²³⁶ gave rise to the broader public’s attention. Before the discussion of the high-profile case, it’s worth noting the background of the embraced par-

²³³ 960 F.2d 301 (2d Cir. 1992)

[online] Available at: <https://casetext.com/case/rogers-v-koons-3> [Accessed 13 Jan. 2020].

²³⁴ John Henry Merryman, Albert E. Elsen, Stephen K. Urice, *Law, Ethics and the Visual Arts* (Kluwer Law International, 5th ed, 2007), 554-564.

²³⁵ see further relative references to the case: Constance L. Hays, “A Picture, a Sculpture and a Lawsuit”, *The New York Times*, 19 September 1991. [online] Available at: <https://www.nytimes.com/1991/09/19/nyregion/a-picture-a-sculpture-and-a-lawsuit.html> [Accessed 13 Jan 2020]; Cary J. Craig, *Copyright, Communication and Culture: Towards a Relational Theory of Copyright Law* (Edward Elgar, 2011, 22-26); Lori Petruzzelli, “Copyright Problems in Post-Modern Art”, 5 *DePaul J. Art, Tech. & Intell. Prop. L.* 115 (1995): 139-144. Available at: <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1415&context=jatip>; [Accessed 03 Jan. 2020].

Ben Picozzi, “What’s Wrong with Intentionalism? Transformative Use, Copyright Law, and Authorship”, 126 *Yale L.J.* (2017): 1423-1424, [online] Available at: <https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=5797&context=ylj>;

James Traub, “Art Rogers vs. Jeff Koons”, (21 Jan. 2008) [online] Available at: <https://designobserver.com/feature/art-rogers-vs-jeff-koons/6467> [Accessed 09 Jan. 2020];

Linda Joy Kattwinkel, “Legalities 30: Jeff Koons and Copyright Infringement”. [online] Available at: <https://www.owe.com/resources/legalities/30-jeff-koons-copyright-infringement/> [Accessed 11 Dec. 2019]; Laura Gilbert, “No Longer Appropriate?”, *The Art Newspaper*, Issue 235. (09 May 2012) [online] Available at: <http://ec2-79-125-124-178.eu-west-1.compute.amazonaws.com/articles/No-longer-appropriate/26378> [Accessed 03 Jan. 2020].

²³⁶ In recent years Koons has espoused the attribute of being an “appropriation artist”, adopting in his artistic philosophy the following motto: “*Art has this ability to allow you to connect back through history in the same way that biology does. I am always looking for source material*”. “Jeff Koons Quotes”. BrainyQuote, [online] Available at: https://www.brainyquote.com/quotes/jeff_koons_444917 [Accessed 11 Jan. 2020].

ties, for a spherical understanding of the artistic aspects in the relevant issue. Jeff Koons is being recognized as a major figure of Neo-Pop art movement that flourished in the 80's, combining elements of popular culture, banal objects and cult exponents (celebrities) of that era.^{237, 238} Actually, Koons inaugurated an art movement based on the commodification of the objects, tracing the mere daily materials and adds symbols in "high art". For many scholars, Jeff Koons is considered the successor of Duchamp, appropriating existing prototypes in a blurring way that balances between kitsch and artistic merit.

The case at issue, was first argued in the District Court for the Southern District of New York, in 1990²³⁹ and then on the appellate court, after the plaintiff's appeal in the United States Court of Appeals for the Second Circuit,²⁴⁰ in 1992, which finally confirmed the initial judgment. In that case, Art Rogers, was the plaintiff, a modestly renowned professional American artist - photographer. On the other hand, Jeff Koons, was the defendant, the famous artist, frequently being involved in appropriation cases. The factual background of that case has as follows: In 1980, Rogers, after having been commissioned by Jim Scanlon, produced the contentious black and white photograph, under the title "Puppies",²⁴¹ (Fig. 40), which depicted a married couple with their eight German Shepherds. The print initially was sold for a low price to Scanlon and after that Rogers reached an agreement and licensed the Museum Graphics for note card reproductions.²⁴² Meanwhile, Jeff Koons during the years 1986-1987 had travelled across Europe trying to find the appropriate place to accommodate his workshop for an upcoming project which would be relied exclusively on sculptures made from porcelain, mirror and wood, entitled "Banallity Show".

²³⁷ "Jeff Koons, Art, Bio, Ideas". The Art Story [online] Available at: <https://www.theartstory.org/artist/koons-jeff/> [Accessed 11 Jan. 2020]; see also: Darren Hudson Hick, *Artistic License: The Philosophical Problems of Copyright and Appropriation*. University of Chicago Press, (2017), 141-143.

²³⁸ Jeff Koons and Norman Rosenthal, *Jeff Koons. Conversations with Norman Rosenthal* (Thames & Hudson, 2014).

²³⁹ *Rogers v. Koons*, 751 F. Supp. 474 (S.D.N.Y. 1990) [online] Available at: <https://law.justia.com/cases/federal/district-courts/FSupp/751/474/1745065/> [Accessed 11 Jan. 2020].

²⁴⁰ *supra* note 233.

²⁴¹ see Figure 40.

²⁴² *supra* note 233, at B.

In 1987, Koons bought a note card of “Puppies”, drawing direct inspiration - as he acknowledged - for the creation of his disputed work “String of Puppies”,²⁴³ (Fig. 41), after having torn off Roger’s copyright label. According to Koon’s perception, the particular note card has been gathering *“the certain typical criteria of mass culture eligible to a workable source”*.²⁴⁴

Afterwards, what actually Koons employed was to commission in expert Italian artisans located in chosen studios to fabricate faithfully in three-dimensional sculpture the endearing depiction in Roger’s photograph, under his accurate instructions and specifications. In his interview at Norman Rosenthal, Koon stated that the piece “String of Puppies” was absolutely *“painted in a kind of Indian way, with the blue of the puppies, the figures, the colours with orange and the flowers”*, trying to transfuse his personal artistic “touch” in the work.²⁴⁵ Actually, considering Landes’s thoughts, he insisted that: *“Koons role was obviously conceptual. He did not physically make the sculptures but chose the subject matter, medium, size, materials and colors”*.²⁴⁶

At the end of the day, in 1988, the polychromed wood sculpture, an exact replica of Roger’s photograph was exhibited at the Sonnanbend Gallery. Three copies of the “String of Puppies” were purchased by private collectors for an amount of 367,000 \$ and the fourth one was kept by Koons. Not to mention that Koons had never asked for prior Roger’s authorisation for the use of the photographed image “Puppies”. As far as Rogers was informed by his client about the published photograph of “String of Puppies” in a newspaper, he hastened to take legal action and in 1989 filed a suit for copyright infringement and unfair competition against Koons and Sonnabend Gallery which displayed the disputed work.

²⁴³ see Figure 41

²⁴⁴ supra note 233, at D 305

²⁴⁵ supra note 238, at 214-215.

²⁴⁶ Landes, supra note 137, at 14-15.



Figure 40: Art Rogers, *Puppies*, 1980, [online] Retrieved from: <http://www.rifatsahiner.com/images/Art%20Rogers,%20Puppies,%201985.jpg>, <https://designobserver.com/feature/art-rogers-vs-jeff-koons/6467> [Accessed 13 Jan. 2020].



Figure 41: Jeff Koons, *String of Puppies*, 1988. [Polychromed wood; 42 x 62 x 37 in. (106.7 x 157.5 x 94 cm)]. Private collection; courtesy Hauser & Wirth. © Jeff Koons. [online] Retrieved from: <https://whitney.org/audio-guides/19?language=english&type=general&night=false&stop=13> [Accessed 13 Jan. 2020].

During the prior proceedings stage Rogers moved for summary judgement. Finally, the District Court ended up to the opinion of copyright infringement, rejecting Koon's fair use defence, entering, moreover, a permanent injunction ordering the defendants from "*making, selling, lending or displaying any copies of, or derivative works based on "Puppies"*", opining at the same time the return and delivery of all the infringing objects to the plaintiff.^{247, 248}

Before assessing the assumption of Koon's eligibility in fair use exemption, the Court had to determine specific issues with significant legal implications associated with the establishment of a copyright infringement. For that reason, it was necessary to examine:

a) whether Rogers's work qualified for copyright protection, fulfilling the fundamental originality criterion. The establishment of ownership of copyright in an original work of art is the crucial emerged question and

b) the case of the unauthorized copy from the defendant.

Regarding the case at issue, the necessary standard of originality was easily proved and the Court stated that Rogers had stabilized copyright ownership, since the subject matter in "Puppies" was distinguished for its unique expression, displayed under specific calibrated conditions such as composition, lighting, posing, colors arrangement and selection of camera, enriching its author's free and creative choices.²⁴⁹ Under this analysis, "Puppies" was really an original product of Rogers' own artistic creation. In relation to the unauthorised copied material, the Court held that the illicit copying was explicitly obvious in a way that didn't require a trial.

Meanwhile, the Court paid attention also to the substantial similarity between the infringing and the infringed work, pointing to the "idea/expression" dichotomy which separates the simple ideas and the facts (belonging to the public domain) from the original expression of the author's articulated ideas and principles. So, in *Rogers v. Koons*, the particularity of Roger's expression of the concept under the specific conditions of placing, expressions of the subjects, the lighting etc. transfused his photograph with the original - unique character that made it copyrightable.

²⁴⁷ supra note 233, at 306.

²⁴⁸ supra note 234, at p. 558.

²⁴⁹ supra note 233, at 307

Additionally, the Court concluded that Koons did not restrict himself to the copy of the idea depicted in the photograph, but he made use of the identical expression encompassed in the work, copying blatantly the essence of Rogers's work in such an extensive degree that the "average reasonable observer" could recognize their substantial resemblance.²⁵⁰, ²⁵¹ Thus, under the current conditions, Koons's sculpture was found to be a copy of Rogers's original work.

After revealing the validity of Rogers's ownership and Koons's infringing act of copying, the Court proceeded to the determination of defendant's fair use defense, applying "ad hoc" the principle, which takes into consideration the circumstances of each case separately.²⁵² The relevant provisions of Section 107 of the U.S. Copyright Act of 1976 clarify (indicatively) the factors that define a use as "fair".²⁵³ As regards the first factor, (purpose and character of the use), the Court alleged that the question at issue concerned the prevailing of good faith's element to public benefit (during the process of copy) or not, connecting it with the commercial purposes of the infringer. As long as Koons's primary conduct was to remove Rogers's copyright portion of the copied notecard just before its dispatch to the Italian workshop, the fact itself suggested "*bad faith in defendant's use of plaintiff's work, aiming to profit-making incentives and militated against a finding of fair use*".²⁵⁴

Pursuant to the provision of §107 U.S. Copyright Act the use of a copyrighted work for purposes such as criticism or comment may be eligible to fair use principle. The case at bar was whether the sculpture "String of Puppies" qualified for fair use under the concept of criticism or comment on the copied photograph. Defendant alleged the parody argument,²⁵⁵ in order to justify his privilege in fair use defense, under the cover of criticism or comment of the original. In order to enrich his credibility, Koons undermined that his primarily purpose was to comment on society at large; actually his goal was to highlight the society's obsession with commodities and mass reproduced images, criticizing the political, social and economic system. For that reason he provid-

²⁵⁰ Sterling, supra note 145, at 236-237.

²⁵¹ supra note 233, at 308.

²⁵² Merryman, supra note 234, at 559. "...the test is dependent on the circumstances of each case...".

²⁵³ 17 U.S.C. §107.

²⁵⁴ supra note 234, at 559-560.

²⁵⁵ Sterling, supra note 145, at 366; Okpaluba, supra note 184, at 202-206.

ed the Court with the necessary information making reference to the American artistic movement that had inspired him in the past.

In front of the dilemma of whether the “String of Puppies” could fall within the meaning of parody, the Court was forced to define it first.²⁵⁶, ²⁵⁷, ²⁵⁸ Koons’s sculpture could not be entitled to fair use privilege relying on parody plea, as far as the Court stated that *“the copied work must be, at least in part, an object of the parody”*, articulating that otherwise there would be no need to conjure up the original work.²⁵⁹, ²⁶⁰ The aforementioned judicial analysis had as a result the collapse of the first factor and the militation against a finding of fair use.

In terms of the “nature of the Copyrighted Work” factor, the Court stated that considering the “Puppies”, as an original work of art based on fictional, beyond factual characteristics, it gathers the qualities of creativity and imaginativeness and for that reason it grants its author for reward.²⁶¹ Furthermore, the third factor of fair use test weights the “amount and substantiality of the work used”, meaning basically the qualitative degree of copying, which is being interpreted as the “essence” of the original

²⁵⁶ supra note 233, at 310

²⁵⁷ supra note 234, at 560.

The Court’s approach to parody or satire has been associated with purpose of *“comic effect or social commentary”*, under which an artist *“closely imitates the style of another artist and in so doing creates a new art work that makes ridiculous the style and expression of the original”*.

²⁵⁸ Landes, supra note 137, at 15.

According to Landes: *“A privileged parody requires that it targets the original work. No privilege is given to a parody that uses the original work as a “weapon” to comment on society at large. The economic rationale for this distinction rests on the idea of high transaction costs preventing a value maximizing exchange”* (15).

²⁵⁹ Petruzzelli, supra note 235, at 139-145.

“What distinguishes Koons’s sculpture from Campbell’s song is that Koons was not parodying Rogers’ work, instead he was using it as a vehicle to comment on society in general. Again, the court in Campbell gives us guidance on post-modern art’s claim of parody.

...Nevertheless, parody is distinguishable from appropriate on art. In Rogers, the court stated that, “under our cases parody and satire are valued forms of criticism, encouraged because this sort of criticism itself fosters the type of creativity protected by the copyright law.” Appropriation art, unlike parody, sometimes lifts a whole image in its entirety and simply places it in a new context. This type of use adds nothing original to the creative expression of the underlying work. A parody, however, reproduces elements of the underlying work and incorporates these elements into a new, original work. In this way, a parodist contributes something original to a work, which is encouraged under the Copyright Act. An appropriation artist, on the other hand, characteristically fails to contribute any original expression to the underlying work, which is contrary to the Copyright Act’s incentive structure.”

²⁶⁰ Picozzi, supra note 235, at 1423.

²⁶¹ supra note 233, at 311.

(that is copied) in relation to its whole,²⁶² Koons's total duplication undoubtedly, exceeded the allowable level of copying that the fair use doctrine dictates.

In respect to the fourth factor of the "effect of the use upon the original's potential market value" the Court reaffirmed that Koons's work was intended for commercial profit and actually he had no intention to reward the legitimate author. At last, the Court concluded to the most important factor, sealing its decision with the central concern of Copyright law that "*unfair copying undercuts demand for the original work, resulting to the chilling effect for the creation of such works*".²⁶³, ²⁶⁴ Besides, the Courts tend to consider the harmful *effect on the market not only for the original works but for the derivative works as well*.²⁶⁵ Afterwards, plaintiff's future harm was presumed and the market for the original work has been evidently prejudiced.

Despite the rejection of fair use defense in *Rogers v. Koons* which caused many controversial views in the artistic and judicial community, Koons continued to apply the appropriation practice, incorporating copyrighted material from other artists in his works, as the following case proves it.

4.2. *Blanch v. Koons*²⁶⁶

In famous *Blanch*, the Second Circuit stabilized its ruling granting Jeff Koons with the privilege of fair use on the grounds of the transformative nature of the use.²⁶⁷ More particularly, the topic of that action was based on a painting, entitled "Niagara" which

²⁶² Merryman, *supra* note 234, at 561-562.

In Koons's case the Court held that the "Puppies" copying was nearly in its entirety, referring that "*even if the sculpture had been a parody of the plaintiff's work, the essence of copying was much more than would have been necessary*" (p. 562).

²⁶³ *ibid.*, at 562-563.

²⁶⁴ *supra* note 233, at 312; Debra L. Quentel, "Bad Artists Copy. Good Artists Steal. The Ugly Conflict Between Copyright Law and Appropriationism", *UCLA Entertainment Law Review*, 4(1), (1996), 55-63.[online] Available at: <https://escholarship.org/content/qt45c1d5bx/qt45c1d5bx.pdf> [Accessed 16 Jan. 2020].

²⁶⁵ *ibid.*, at 562, 63.

²⁶⁶ 467 F.3d 244 (2d Cir. 2006)

[online] Available at: https://scholar.google.com/scholar_case?case=3752630071472494999 [Accessed 15 Jan. 2020].

The complaint also named The Solomon R. Guggenheim Foundation and Deutsche as co-defendants, as they commissioned the particular piece of art at issue.

²⁶⁷ Patrizia Aufderheide and Peter Jaszi, *Reclaiming Fair Use: How to Put Balance Back in Copyright* (University of Chicago Press, 2011), 89.

belonged to a series of works, entitled "Easyfun-Ethereal" having been commissioned by Deutsche Guggenheim Berlin where it was also exhibited from October 2000 to January 2001.²⁶⁸ Koons's painting depicted four pairs of women's lower legs and feet hanging loosely blatantly over illustrations of delicious confections - donuts and other pastries - against a backdrop of Niagara Falls,²⁶⁹ (Fig. 42,45) and it was created by the partial use of an add that had appeared in a fashion magazine (Allure, August 2000).

The add was a photo taken from a professional photographer, Andrea Blanch (the plaintiff) with the title "Silk Sandals by Gucci",²⁷⁰ ²⁷¹ (Fig. 43,44) and depicted a pair of woman's lower legs and feet, with bronze polished toenail that wore glossy sandals made by Gucci Group resting on a man's foot. What Koons made was to draw up the photo and after having it digitally scanned, to adapt - via the collage technique - only the legs, discarding the other elements of the background to his own version. Moreover, Koons, applied complementary alterations such as colour modifications and inverting of legs' orientation).



Figure 42: Jeff Koons, *Niagara*. (from *Easyfun-Ethereal*) (2000). [Oil on canvas] 10 x 14 feet (304.8 x 426.7 cm). Solomon R. Guggenheim Museum, New York Commissioned by Deutsche Bank AG in consultation with the Solomon R. Guggenheim Foundation for the Deutsche Guggenheim, Berlin. [online] Retrieved from: <https://www.guggenheim.org/artwork/10734> [Accessed 16 Jan. 2020].

²⁶⁸ supra 266, at 247.

²⁶⁹ see Figures 42,45 (right).

²⁷⁰ supra note 266, at 248.

²⁷¹ see Figures 43, 44 (left).



Figure 43: Andrea Blanch. *Silk Sandals by Gucci*, (August 2000), Allure magazine. [online] Retrieved from: <http://ip-updates.blogspot.com/2006/11/purpose-and-meaning-of-work-supports.html> [Accessed 15 Jan. 2020].



Figure 44 (left): Andrea Blanch. *Silk Sandals by Gucci*, (August 2000), Allure magazine; Figure 45 (right): Jeff Koons, *Niagara*. (from *Easyfun-Ethereal*) (2000). [online] Retrieved from: <http://pnwstartuplawyer.com/fair-use-illustrated-appropriation-art/> [Accessed 15 Jan. 2020]

In “Niagara”, the disputed photo depicting the infringing part - the Blanch’s legs - are second from the left among the Koons’s four pairs of legs. Koons, admittedly, had never asked for permission for the use of Blanch’s image. Therefore, Blanch (plaintiff) filed a suit against Koons (defendant) alleging copyright infringement in her work.

In *Blanch*, the District Court considered the four - non exclusive- factors that determine fair use under 17 U.S.C. § 107 and delineated these favoring over Koons's transformative use of "Niagara", legitimizing his action.²⁷² At the secondary judgment, the Court of Appeals reaffirmed as appropriate the finding of fair use, underlining the following:

- The markedly different objectives in Koon's use of Blanch's photo in relation to her own purposes of creating the work, (as she admitted), certified the transformative character of the work. Besides, Koons's goal was to challenge social commentaries upon the impact of mass media, while on the contrary, Blanch's orientation was to highlight a more sensual aspect in her photos, a kind of eroticism of the moment²⁷³. Under that interpretation of the new communicative meaning and expressive purpose, Koon's work was recognized transformative.
- As concerns the commercial nature on Koons's "Niagara" and his obvious deriving profit, the "substantially transformative" character of the work, discounted the commercial nature of that use.^{274, 275}
- Regarding the second factor of fair use, the nature of the copyrighted work, the Court stated that it had limited impact hereon, as far as the transformative use prevailed, overshadowing its commercial nature.²⁷⁶
- Assessing the third factor of fair use, the Court pointed to *Campbell*²⁷⁷ favored Koons, as long as, the use of Blanch's original extracted image was absolutely reasonable in relation to his creative purpose for which he copied it.^{278, 279} Actually, Koons dupli-

²⁷² supra note 266, at 252-253.

²⁷³ *ibid.* at 251-252; Jeannine M. Marques, "Fair Use in the 21st Century: Bill Graham and *Blanch v. Koons*," *Berkeley Technology Law Journal* 22, no. 1 (2007): 345-347. [online] Available at: www.jstor.org/stable/24118221 [Accessed 18 Jan. 2020]; see also: Helle Porsdam, *Copyrighting Creativity: Creative Values, Cultural Heritage Institutions and Systems of Intellectual Property*, (Routledge, 1st ed., 2015), 187.

²⁷⁴ supra note 266, at 254.

²⁷⁵ Lead Report, "Transformative Nature of Jeff Koons Work 'Discounts' Commercial Significance of Use", (01 Nov. 2006) [online] Available at: <http://homepages.law.asu.edu/~dkarjala/Copyright/BlanchVKoons%282C10-2006%29.htm> [Accessed 17 Jan. 2020].

²⁷⁶ supra note 266, at 257.

"Paraphrasing Bill Graham Archives, the second fair-use factor has limited weight in Koons case due to the transformative manner of his work to comment on Blanch's image social and aesthetic meaning rather than to exploit its creative virtues.(See also Bill Graham Archives, 448 F.3d at 612-13.)

²⁷⁷ see *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994)

²⁷⁸ supra note 266, at 258.

²⁷⁹ *Legalities 30: Jeff Koons and Copyright Infringement. Lesson 4: Blanch v. Koons - Appropriation art may be protected as "transformative".* [online] Available at: <https://www.owe.com/re->

cated only the necessary parts of the image, removing essential - heart elements from Blanch's photo, such as the airplane cabin and the legs setting. In that way, Koons attributed a new aesthetics and understanding to his creation.²⁸⁰

- Regarding the fourth fair use factor, the Court followed Blanch's own acknowledgements underlying that she had never been subject to harmful consequences from Koons's use of her photograph. Moreover, she claimed that Koons's alleged action wasn't deleterious to her plans over "Silk Sandals" or other works and even more, she assured that the value of her image did not diminish after Koons's alleged infringement.²⁸¹

To sum up in *Blanch v. Koons*, the defendant's victory was resounding, proving the flexibility of fair use application. The Court's ruling on the wide fair use interpretation gave prominence to the dominant factor of transformativeness and opened the horizon for future moderate treatment in cases of appropriation.

4.3. *Cariou v. Prince*

After having introduced the readers to the concept of major copyright infringement cases, the next case spells out one of the most complicated copyright cases of appropriation art in copyright litigation history, the well-known *Cariou v. Prince*.²⁸² Actually what stimulated me to address that case was the provocative quote articulated by Richard Prince,²⁸³ attempting to "legitimize" his constant appropriation practice as fol-

[sources/legalities/30-jeff-koons-copyright-infringement/](#) [Accessed 12 Dec. 2019]; Darren Hudson Hick. *Artistic License: The Philosophical Problems of Copyright and Appropriation*. University of Chicago Press, 2017, pp. 143-145.

²⁸⁰ Marques, *supra* note 273, at 347.

²⁸¹ *supra* note 266, at 258.

²⁸² *Cariou v. Prince*, 714 F.3d 694, 698 (2d Cir. 2013), [on line] Available at:

https://cyber.harvard.edu/people/tfisher/cx/2013_Cariou.pdf [Accessed 10 Nov. 2019].

²⁸³ "Richard Prince" The Art Story, [online] Available at: <https://www.theartstory.org/artist/prince-richard/>; "Covering Pollock" Features New Works by Richard Prince on the Artist Jackson Pollock. ArtDaily [On line] <https://artdaily.cc/news/49825/-Covering-Pollock--Features-New-Works-by-Richard-Prince-on-the-Artist-Jackson-Pollock-#.Xjc8JU8zYix>

According to Art Daily newspaper: "In 2007, the Guggenheim presented a critical examination of Prince's work and in an overview stated: "Prince is one of the most innovative American artists to have emerged during the last 30 years. His deceptively simple act in 1977 of rephotographing advertising images and presenting them as his own ushered in an entirely new, critical approach to art making; one that questioned notions of originality and the privileged status of the unique aesthetic object. Prince's technique involves appropriation; he pilfers freely from the vast image bank of popular culture to create works

lows: *"It would be strange for me to think I'm being ripped off, because that's what I do!"*²⁸⁴

The initial approach analyzes the factual background behind the case in order to be formulated an overall framework. Patrick Cariou was a professional photographer who had lived over six years among Rastafarians in Jamaica and having gained their trust, he managed to take a series of their portraits. The product of that extraordinary "encounter" was the driving force for Cariou to publish in 2000 a black and white book entitled "Yes Rasta", which consisted of classical portraiture and landscape photos. Actually, Cariou's book release had a limited success.²⁸⁵

On the other hand, Richard Prince,²⁸⁶ the celebrated forward - thinking contemporary artist who has been characterized the pioneer and the master of Appropriation Art, actually building his success on appropriation practice, has occupied the public opinion many times having been involved for decades in appropriation legal battles. Due to the bluntness of stealing other artists' works, Prince has pushed the limits of appropriation. In 2005, Prince came across a copy of Cariou's book, "Yes Rasta"²⁸⁷,²⁸⁸,²⁸⁹ (Fig. 46,47,51), which became the "reservoir" of his impending work, entitled "Canal Zone" (Fig. 48, 49,50,52 right).²⁹⁰

that simultaneously embrace and critique a quintessentially American sensibility: the Marlboro Man, muscle cars, biker chicks, crude jokes, gag cartoons, and pulp fiction."

[Accessed 15 Jan. 2020]; See also Phillips, Prince Biography.

"...Prince is widely acknowledged as having expanded the accepted parameters of art-making with his so-called "re-photography" technique – a revolutionary appropriation strategy of photographing pre-existing images from magazine ads and presenting them as his own". [on line] Available at: <https://www.phillips.com/detail/richard-prince/UK010617/13> [Accessed 15 Jan. 2020].

²⁸⁴ Ian Chilvers, John Graves-Smith, A Dictionary of Modern and Contemporary Art, (1998 1st ed., Oxford University Press, 2009), 576.

"...Prince commented to an interviewer: "It would be strange for me to think I'm being ripped off, because that's what I do!"

²⁸⁵ supra note 282, at 21-22.

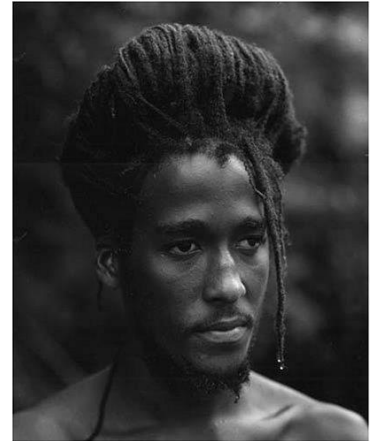
²⁸⁶ supra note 282, at 23.

²⁸⁷ ibid, at 24.

²⁸⁸ Cariou, Patrick. "Yes Rasta", powerhouse Books, [online] Available at: <http://www.powerhousebooks.com/books/yes-rasta/>

²⁸⁹ see Figures 46, 47, 51 (left).

²⁹⁰ "Richard Prince: Canal Zone, West 24th Street New York, November 8 - December 20, 2008". Gagosian [online] Available at: <https://gagosian.com/exhibitions/2008/richard-prince-canal-zone/>; see also Figures 48, 49, 50, 52 right).



Figures 46,47: Patrick Cariou, Photographs from *Yes Rasta*. [online] Retrieved from: <https://www.amazon.co.jp/Yes-Rasta-Perry-Henzell/dp/1576870731> [Accessed 15 Jan. 2020]



Figure 48: Richard Prince, *The Canal Zone*, (2007). [Mixed media on homosote, 48 x 82^{3/4} inches (121.9 x 210.2 cm)]. (online) Retrieved from: <https://www.artspace.com/magazine/contributors/see-here/walter-robinson-on-canal-zone-52322>; <https://gagosian.com/exhibitions/2014/richard-prince-canal-zone/> [Accessed 15 Jan. 2020]



Figure 49: Richard Prince, *Back to the Garden*, (2008). [Collage, inkjet, and acrylic on canvas, 80 x 120 inches (203.2 x 304.8 cm)]. [online] Retrieved from: <https://museemagazine.com/culture/culture/art-out/richard-prince-canal-zone-at-gagosian-gallery>; <https://gagosian.com/exhibitions/2014/richard-prince-canal-zone/> [Accessed 15 Jan. 2020]



Figure 50: Richard Prince, *James Brown Disco Ball*, (2008). [Collage, inkjet, and acrylic on canvas, 100^{1/2} x 154^{1/2} inches (255.3 x 392.4 cm)]. [online] Retrieved from: <https://americansuburbx.com/2015/07/patrick-cariou-v-richard-prince-et-al-the-appeal-verdict.html>; <https://gagosian.com/exhibitions/2014/richard-prince-canal-zone/> [Accessed 15 Jan. 2020]

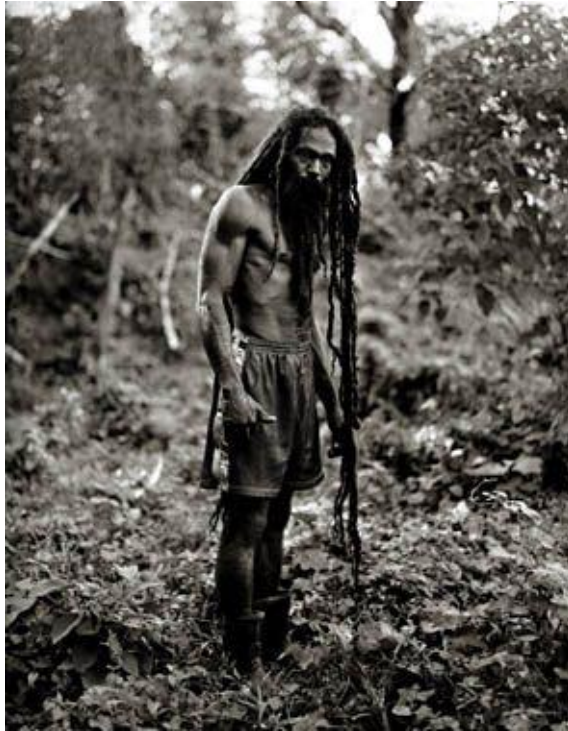


Figure 51 (left): Patrick Cariou, original photograph from *Yes Rasta* (p. 118) by Brooklyn, NY: power-HouseBooks Copyright (2000); [online] Retrieved from: <https://nl.pinterest.com/pin/334533078546916198/?lp=true> [Accessed 15 Jan. 2020]

Figure 52 (right): Richard Prince, *Graduation*, (2008). [Collage, inkjet, and acrylic on canvas, 72^{3/4} x 52^{1/2} inches (185 x 133 cm)]. [painting from Richard Prince's 2008 "Canal Zone" series], [online] Retrieved from: https://www.artspace.com/magazine/contributors/see_here/walter_robinson_on_canal_zone-52322; <https://gagosian.com/exhibitions/2014/richard-prince-canal-zone/> [Accessed 15 Jan. 2020]

At this series of works, Prince tore off 35 photographs from Cariou's book without asking prior for permission, and after making minor alterations, he incorporated them in a collage of paintings which was exhibited first at 2007 and 2008 at Eden Rock Hotel in Saint Barthelemy and after at Gagosian Gallery in New York.²⁹¹ Meanwhile, during the new art show, the gallery had undertaken to publish Prince's reproductions in catalogues for commercial reasons.²⁹²

Consequently, running Prince's "Canal Zone" solo exhibition at Gagosian, Cariou had negotiated with another art gallerist, named Celle to collaborate for an exhibition which would include works from "Yes, Rasta". Nevertheless, Celle retreated as long as learned about Gagosian's exhibition.²⁹³ After that, in 2008 Cariou filed a copy-

²⁹¹ supra note 282, at 24.

²⁹² ibid. at 33.

²⁹³ ibid. at 34,35.

right infringement suit against Richard Prince, the Gagosian Gallery, Lawrence Gagosian (the owner) and the publisher Rizzoli.²⁹⁴

Subsequently, the defendants attempted to stabilize their defense in the legal basis of fair use doctrine under the “envelope” of transformative nature of the allegedly infringing works. In order to persuade the court, Prince testified that the only purpose of his work in general was based both on his insight and venture to profoundly alter a preexisting subject - matter into something abundantly different.^{295, 296}

At the primary judicial judgment, the District Court²⁹⁷ ultimately has not been convinced for Prince’s fair use and ruled in favor of Cariou, deciding that all Prince’s works had breached Cariou’s copyrighted photographs. Judge Batts disagreed on the grounds that the fair use principle was applied in cases of “substantial transformative” use. Actually, Judge Batt interpreted narrowly the transformative element, emphasizing at the requirement of the commentary way of the new work, especially related to an historical context, or its critical reference back to the original works.²⁹⁸ So, in the extent that Princes’s intent was not to comment or critically refer to Cariou or his works, or on aspects of popular culture closely associated with Cariou or his photos at the time of their appropriation, it could not be established the “transformative” element.²⁹⁹

The Court of Appeals starting the discussion about fair use, focused on its Constitutional role as a mediator who has to balance the two sides, namely the Copyright law (the protection of intangible property rights over creative works) and “*the ability*

²⁹⁴ *ibid.* at 36.

²⁹⁵ *ibid.* at 36, 54.

²⁹⁶ Caroline L. McEneaney, “Transformative Use and Comment on the Original: Threats to Appropriation in Contemporary Visual Art”, 78 *Brook. L. Rev.* (2013), 1539. [online] Available at: <https://brooklynworks.brooklaw.edu/blr/vol78/iss4/8> [Accessed 20 Dec. 2019].

(*In response to questions about his reasons for using appropriation in his work, Prince said that he “wanted to contribute to something that already existed in the world”*).

²⁹⁷ 784 F.Supp.2d 337 (2011) [online]

Available at: [https://scholar.google.com/scholar_case?case=18222445238017802130%20%20\(344\)](https://scholar.google.com/scholar_case?case=18222445238017802130%20%20(344))

²⁹⁸ Tristan C. Robinson, “Should it be considered fair use for artists to take a photographer’s work and transform it for profit?”, T.C. Robinson Law, 26 Febr.2014.[online] Available at:

<http://blog.tcrobisonlaw.com/should-it-be-considered-fair-use-for-artists-to-take-a-photographers-work-and-transform-it-for-profit/> [Accessed 14 Jan. 2020];

“Appropriate Standards in Appropriation Art? Cariou v. Prince Decision Garners Relief but Fails to Provide Substantive Guidance”, Center for Art Law, 29 March 2013. [online] Available at: <https://itsartlaw.org/2013/04/29/appropriate-standards-in-appropriation-art-cariou-v-prince-decision-garners-relief-but-fails-to-provide-substantive-guidance/> [Accessed 14 Jan. 2020].

²⁹⁹ *supra* note 282, at 36.

of authors, artists, and the rest of us to express the creative works and ourselves by reference to the works of others".³⁰⁰ Under that prism, the Second Circuit, started the proceeding of the four factors test,³⁰¹ considering initially the first factor of "transformative nature"^{302, 303} as the core of fair use doctrine. After a brief reference to exceptional cases of parody or satire (such as "Pretty Woman case and Andy Warhol's case), the Court followed the law's provision that defines that "*a work shall comment on the original or on the author in order to be transformative*", and stated that the pivotal issue in applying the first factor is "*whether the new work alters the original creation adding a new expression, meaning, or message, transfusing a new insight and understanding*".³⁰⁴

The Second Circuit overturned the primary judicial judgment in part, as it found erroneous the District Court's use of first factor standard, determining that the critical issue for the assertion of the "transformative" nature that grants the defendant with the fair use privilege is how sufficiently transformative the work in question appears to the "reasonable observer",^{305, 306} namely how the average viewer perceives that particular work according to with his/her own aesthetic criteria and not simply what an artist might say about that piece.³⁰⁷

³⁰⁰ *ibid.*, at 41.

³⁰¹ *ibid.*, at 42-48.

³⁰² Picozzi, *supra* note 235, at 1424-1426.

³⁰³ Brockenbrough A. Lamb, "Richard Prince: Author of The Catcher in the Rye: Transforming Fair Use Analysis", 49 *U. Rich. L. Rev.* 1293 (2015): 1305-1306 [online] Available at: <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1124&context=law-student-publications> [Accessed 11 Dec. 2019].

³⁰⁴ *supra* note 282, at 52.

³⁰⁵ "Patrick Cariou v. Richard Prince, et al - The Appeal Verdict", American Suburb X, 24 July 2015, [online] Available at:

<https://americansuburbx.com/2015/07/patrick-cariou-v-richard-prince-et-al-the-appeal-verdict.html> [Accessed 12 Dec. 2019]; Jasmine Abdel - Khalik, "Transformativeness and Fungibility in Art: Copyright's Fair Use in Visual Appropriation Art", Copyright Symposium, 10 October 2019, 28. [online] Available at: https://copyrightsymposium.byu.edu/papers/Transformativeness_and_Fungibility_in_Art.pdf [Accessed 05 Jan. 2019].

³⁰⁶ *ibid.*, at 56; Sergio M. Sarmiento & Lauren van Haaften-Schick, Cariou v. Prince: Toward a Theory of Aesthetic-Judicial Judgments, 1 *Tex. A&M L. Rev.* 941 (2014). p. 947 Available at: <https://scholarship.law.tamu.edu/lawreview/vol1/iss4/8/>; Laura A. Heymann, "Reasonable Appropriation and Reader Response" (2019). *Faculty Publications*. (1908): 349-350. <https://scholarship.law.wm.edu/facpubs/1908>.

³⁰⁷ Report to the College Art Association (p. 21-22). [online] Available at: https://cmsimpact.org/wp-content/uploads/2016/01/fair_use_for_visual_arts_communities.pdf (Accessed 25-11-2019) "...On the other, its opinion appears to attach significant weight to Prince's testimony that "what I do is I completely try to change it into something that's completely different...I'm trying to make a kind of fantastic, absolutely hip, up to date, contemporary take on the music scene".

In that sense, *the transformation of a work hangs absolutely on “how the artworks may reasonably be perceived”*.³⁰⁸ In order to conclude to this opinion, the Court of Appeals examined extensively the differences between the copyrighted and the accused works, paying attention to aspects such as the features displayed, the materials used, the size, the colors, the composition etc. and relying on the “observation” standard, manifested that twenty-five of the created Prince’s works were considered absolutely transformative.³⁰⁹ In fact, the Court declared that Prince’s work represented a completely different aesthetic from Cariou’s original photographs, as long as Cariou’s portraits have been distinguished for their savage “quality”, depicting the pure environment and the natural beauty of Rastafarians. On the contrary, Prince’s paintings were exemplary of their “*hectic, jarring, crude and provocative*” qualities.³¹⁰

Undoubtedly, in that case, the Court, stepped on the Campbell’s standard of doctrinal transformation,^{311, 312} and classified Prince’s images as typical of demonstrating a different expressive concept, invested with a *new meaning, employing new aesthetics with creative and communicative results* distinct from Cariou’s. In other words, what Prince made was not to present the disputed images in a different manner, but to complete, to add and enrich them with an unexpected “value”.

Regarding the commercial purpose in cases of transformative works, the Court stated that (as it has already been accepted), the extent of transformation of a secondary use is the crucial element that surmounts the commercial use. Besides, the Court underlined that the premise of commercialism should not be deemed as “presumptively unfair”, granted that such a presumption collided with the “spirit” of law. Afterwards, despite the commercial purpose of Prince’s works, the prevailing transformative nature of the works weighted in favor of him.³¹³

In relation to the factor that determines the “harm on the potential market”, the Court highlighted the substantial differences that categorized each artist’s

³⁰⁸ Darren Hudson Hick, *Artistic License: The Philosophical Problems of Copyright and Appropriation*. University of Chicago Press, (2017), 146.

³⁰⁹ supra note 282, at 53.

³¹⁰ Picozzi, supra note 235, at 1424.

³¹¹ Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994), at 579.

³¹² supra note 282, at 49-51.

³¹³ ibid., at 59.

works.³¹⁴, ³¹⁵ It was also evident that Prince's work targeted to a completely different audience from Cariou's.

Under that rational argument, the Court dictated that the essential meaning of harm is not based on the suppression or destruction of the primary market for the original or (its) potential derivative.³¹⁶ The drawing line is located on whether the original work's usurpation takes place from the secondary use, in the sense that the secondary use is orientated and targets to embrace the same audience or the nature of the infringing context is the same as the original.³¹⁷ Under that spectrum, the Court invoked a peculiar criterion trying to define the markets that both artists address, drawing a distinct line between celebrity, infamous and non-celebrity artists...Based on this consideration, the Court referred to the notorious list of Prince's audience, the wealthy collectors and celebrities who attended the opening of the exhibition.³¹⁸

Therefore, the Court noted that Cariou, as an "amateur" and less known artist, employed a modest enterprise activity, derived from his publication "Yes, Rasta", which characteristically amounted to "*\$8,000 in royalties, selling only four prints and only to personal acquaintances.*"³¹⁹ On the contrary, Prince was portrayed as a "well-established appropriation artist" with remarkable success,³²⁰ having earned from the sold of his works the amount of \$10,480,000.

The consideration of the other two factors of fair use - the nature of the copyrighted work, and the amount and substantiality of the portion used in relation to the work as a whole has been examined under the prevailing of Prince's work transformative nature.³²¹

³¹⁴ *ibid.*, at 60.

³¹⁵ Everson Brittani, "The Narrowest and Most Obvious Limits: Applying Fair Use to Appropriation Art Economically Using a Royalty System", 63 *Cath. U. L. Rev.* 729 (2014). p. 749, [online] Available at: <https://scholarship.law.edu/cgi/viewcontent.cgi?article=3276&context=lawreview>

³¹⁶ *supra* note 282, at 61-62.

³¹⁷ Brockenbrough, *supra* note 303, at 1309-1310; Jennifer Gilbert-Eggleston, "Cariou v. Prince: Painter or Prince of Thieves?" p. 132. [online] Available at: <https://www.law.du.edu/documents/sports-and-entertainment-law-journal/issues/11/JenniferEdited-VersionSELJFall-2011.pdf>

³¹⁸ *supra* note 282, at 63.

³¹⁹ *ibid.*, at 62.

³²⁰ *ibid.*, at 63, "...commenting on the fabulous presence of the "musicians Jay-Z and Beyonce Knowles, artists Damien Hirst and Jeff Koons, professional football player Tom Brady, model Gisele Bundchen, Vanity Fair editor Graydon Carter, Vogue editor Anna Wintour, authors Jonathan Franzen and Candace Bushnell, and actors Robert DeNiro, Angelina Jolie, and Brad Pitt".

³²¹ *supra* note 237, at 64-66.

The Court reaffirmed the fact that despite Cariou's work had gathered the pre-requisites of creativity and publishing, the transformative character of Prince's work was considered of greater importance, weighting on Prince's favor. Moreover, the Court stated that the proportion of the original work used is the crucial element and not how much of the secondary work comprised the original.³²² Subsequently, while Prince had made substantial or even entire use of Cariou's photos in many works, that fact did not weight against him because in several instances such an extensive use is absolutely necessary in order a fair use of the work to be insured. So, the Court held that while some of Canal Zone works remained intact, the twenty-five of them have been considered transformative under a new and different context, concluding that all factors weighted in favor of Prince.³²³

Regarding the remaining five works, the Court stated that the distinguished "minimal alterations" in Prince's works in relation to Cariou's copyrighted photos, made it blurring to determine whether the element of transformative use "pervaded" the works.³²⁴ Under that consideration, the Court remanded the case to the District Court for determination of a fair use or a copyright infringement towards these five works.³²⁵

As it was expected, in *Cariou v. Prince* the contraposition of the Court of Appeals to the District Court inflamed heated debates and challenged many scholars, lawyers and experts from art community.³²⁶ The eminent American Professor of Law Laurence Lessig in his interview at *Cabinet* magazine, (Fall 2002), stated paradigmatically that: "*While appropriation art is critical to art, it's an ambiguous art form in the*

³²² *ibid.*, at 66-68.

³²³ *ibid.*, at 68

³²⁴ *ibid.*, at 69-71; Grammaticaki - Alexiou, Anastasia. Case Law: *Cariou v. Prince*, in *Art and Cultural Property Law, Cases and Material* (Loyola Law School Summer Program, Spetses, 2019), 39-50.

³²⁵ *ibid.*, at 72.

³²⁶ The antithetical decisions allowed for a critical contemplation as regards the legal and artistic dimensions of appropriation in Art. How should adapt their practices the contemporary artists now after the "chilling effect" of such a "bold" opinion, leaving a latitude for unlimited expression? What about the limits of fair use exemption in particular artistic works of contemporary art? Which should be at the end of the day the role of the artist as concerns his/her narrative intentions that might affect the determination of fair use finding?

world of the Supreme Court".³²⁷ In *Cariou* there has been obviously an unexpected expansion of what is considered transformative use.³²⁸

4.4. *Graham v. Prince*³²⁹

In the following lines the paper broaches the recent copyright infringement case involving the notorious appropriation artist Richard Prince, proving that there is no end in his entanglement with litigation. The aforementioned case, alternatively named,

³²⁷ "Righting Copyright: An Interview with Laurence Lessig". Cabinet Magazine, Issue 8/Pharmacopia, Fall 2002, [online] Available at: <http://www.cabinetmagazine.org/issues/8/lessig.php> [Accessed 07 Jan. 2020].

³²⁸ See also relative articles to the case: Carl Suanson, "Is Richard Prince the Andy Warhol of Instagram?" *Vulture*, 18 April 2016, (online) Available at: <https://www.vulture.com/2016/04/richard-prince-the-andy-warhol-of-instagram.html> [Accessed 14 Jan. 2020].

"For Richard the lawsuits are also the artwork. They were a joke. He's devoted to that idea." And even today, as the secure winner, Prince seems really unhappy to have had to play by the rules of the court - or really any rules";

"Richard Prince wins next round of copyright battle: Art: Agenda" *Phaidon*, 26 April 2013, [online] Available at: <https://de.phaidon.com/agenda/art/articles/2013/april/26/richard-prince-wins-next-round-of-copyright-battle/>;

Brian Boucher, "Landmark Copyright Lawsuit *Cariou v. Prince* is Settled", *ARTnews*, 18 March 2014. [online] Available at: <https://www.artnews.com/art-in-america/features/landmark-copyright-lawsuit-cariou-v-prince-is-settled-59702/> (Accessed 14 Jan. 2020);

Randy Kennedy, "Court Rules in Artist's Favor", *The New York Times*, 25 April 2013. [online] Available at: <https://www.nytimes.com/2013/04/26/arts/design/appeals-court-ruling-favors-richard-prince-in-copyright-case.html>;

Cindy A. Villanueva, "*Cariou v. Prince*: A Controversial Redefining of the Distinction between Parody and Satire". (02 March 2015), *The National Law Review* [online] Available at: <https://www.natlawreview.com/article/cariou-v-prince-controversial-redefining-distinction-between-parody-and-satire> (16-01-2020);

Sarah L. Cronin and Joshua M. Keesan, "The Art of Appropriation", *Los Angeles County Bar Association*, March 2014. (p. 23-27), [online] Available at: <https://www.lacba.org/docs/default-source/lal-magazine/2014-test-articles/march2014testarticle.pdf>;

Andrea Neustein, Alex Neustein, "Canal Zone Richard Prince Yes Rasta: Selected Court Documents, &c., &c", (10-2011). [online] Available at: https://brooklynrail.org/2011/10/art_books/canal-zone-richard-prince-yes-rasta-selected-court-documents-c-c [Accessed 15 Jan. 2020];

Barbara Pollack, "Copy Rights", (22 March 2012). [online] Available at: <https://www.artnews.com/art-news/news/copy-rights-522/> (access 12-12-2019); Nicole Martinez, "Why Copyright Infringement is Hard to Prove for Artists", 12-08-2015. [online] Available at: <https://alj.artpreneur.com/copyright-infringement-hard-prove-artists/> (access 10-12-2019)

³²⁹ "*Graham v. Prince Et Al*, No. 1:2015cv10160 - Document 54 (S.D.N.Y. 2017)." *Justia Law* (online) Available at: <https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2015cv10160/451754/54/> [Accessed 18 Jan. 2020].

"*Prince Instagram*" case,³³⁰ involves the professional photographer Donald Graham as a plaintiff and Richard Prince, the celebrated "appropriation" artist, the Gagosian Gallery and the Laurence Gagosian, the owner of the gallery, as defendants.³³¹ In 2014, Prince participated in an exhibition held at Gagosian Gallery in New York entitled "New Portraits",³³² ³³³ (Fig. 53), in which his appropriation technique peaked, intruding the social network Instagram. What exactly Prince employed was to select posted images from other users on Instagram, to modify them in a trivial way, adding simple comments and to present a series of inked prints on canvas, identical with the images he had selected. Undoubtedly, for this action Prince had never asked for prior authorization from the owner of the original photos.³³⁴

Among these overtly reproduced images there was also included the work at issue, a black-and-white photograph shot by the professional photographer Donald Graham, entitled "Rastafarian Smoking a Joint",³³⁵ (Fig. 54), which Prince named "Untitled" (Portrait)³³⁶ (Fig. 55). This work was not only included in the Gagosian's Gallery exhibition, but it was also displayed in *catalogues, in billboards and in Prince's posts on Twitter*.³³⁷

³³⁰ The Prince of Fair Use: Putting the brakes on transformative use. Advanced Solutions International Inc. (online) Available at: https://www.copyright.org.au/acc_prod/ACC/News_items/THE_PRINCE_OF_FAIR_USE__PUTTING_THE_BRAKES_ON_TRANSFORMATIVE_USE_.aspx; McBride D, Webster. "Fair Use Filter? Richard Prince Moves to Dismiss Donald Graham's Lawsuit", HHR Art Law, 29 June 2016. (online), Available at: <https://www.hhrartlaw.com/2016/06/richard-prince-moves-to-dismiss-donald-grahams-lawsuit/> [Accessed 16 Jan. 2020]; Robby Anderson, "Richard Prince, Back in the Spotlight". American Bar Association, 23 August 2016. [online] Available at: <https://www.americanbar.org/groups/litigation/committees/intellectual-property/practice/2016/richard-prince-back-in-spotlight/> [Accessed 17 Jan. 2020].

³³¹ *supra* note 329, at 3.

³³² *ibid.*, at 7.

³³³ see Figure 52; Charlotte Anderson, "Richard Prince: "New Portraits", Cool Hunting, 26 September 2014, (online), Available at: <https://coolhunting.com/culture/richard-princes-new-portraits/> [Accessed 18 Jan. 2020]; "Untitled (Portrait), 2014 by Richard Prince". Artuner (online), Available at: <https://www.artuner.com/shop/untitled-portrait-2014-richard-prince/> [Accessed 16 Jan. 2020]. David Fischer, "Artist Richard Prince Sells Other People's Instagram Pictures for \$100,000", Highsnobiety, 25 May 2015. (online) Available at: <https://www.highsnobiety.com/2015/05/25/richard-prince-instagram/> [Accessed 18 Jan. 2020].

³³⁴ *supra* note 329, at 5-6.

³³⁵ *ibid.*, at 4,7, see also Figure 54 (left)

³³⁶ *ibid.*, at p. 6-8, see also Figure 55 (right).

³³⁷ *ibid.*, at 7-10.

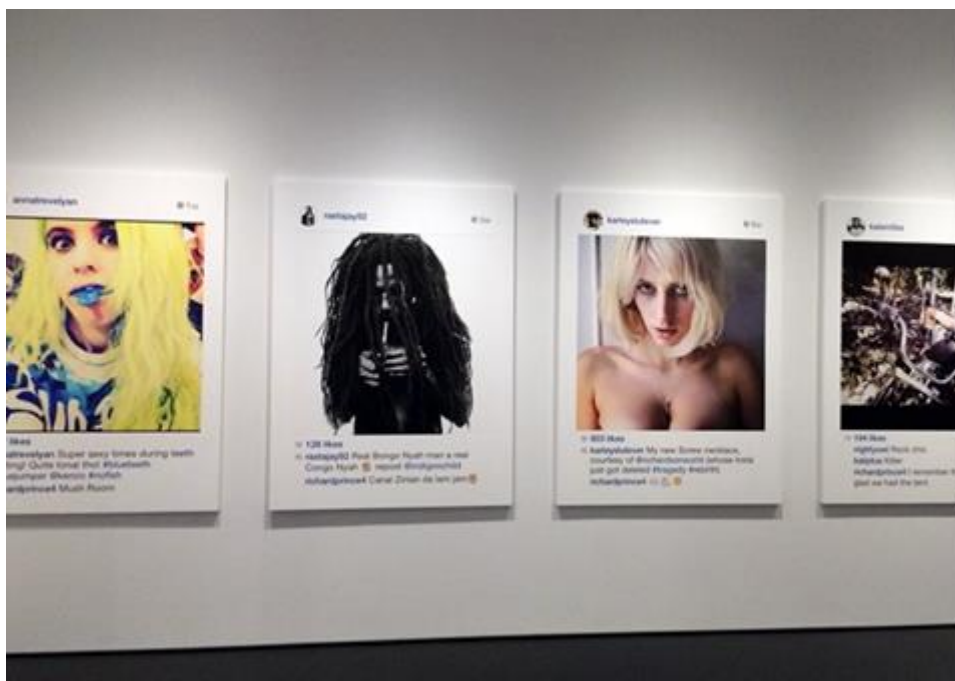


Figure 53: Installation view of Richard Prince, “New Portraits,” at Gagosian Gallery Photo: Paddy Johnson. (online), Retrieved from: <https://news.artnet.com/market/donald-graham-sues-gagosian-richard-prince-401498> [Accessed 15 Jan. 2020]



Figure 54 (left): Donald Graham, photography, “Exhibit A” in the complaint - the “Copyrighted Photograph.” (online), Retrieved from: <https://news.artnet.com/market/donald-graham-sues-gagosian-richard-prince-401498> [Accessed 18 Jan. 2020]

Figure 55 (right): Richard Prince, Instagram Print. [online] Retrieved from: <http://blog.matthewhunt.com/2016/01/new-portraits.html> [Accessed 18 Jan. 2020].

In 2015, Graham moved to a lawsuit in the U.S. District Court for the Southern District of New York against Prince, the Gagosian Gallery and the owner Larry Gagosian claiming for willful copyright infringement.³³⁸ Meanwhile, the defendants proceeded to file a motion to dismiss the case, pleading the fair use clause based on the transformative standard, (relying on the recently decided *Cariou v. Prince* case), which was rejected by the Court as a matter of law that required fact-finding inquiry.³³⁹ Not to mention that, in general lines, the Courts examines the fair use doctrine at the phase of summary judgment.³⁴⁰

During the assertion of arguments, the defendants focused on the first fair use factor - the “purpose and character of the use” - in relation to the allegedly infringing work, indicating the transformative use of Prince’s work.³⁴¹ Although, the Court was opposed to that statement declaring that due to the minimal aesthetic modifications to Graham’s photograph, (Prince made entire use of Graham’s work), comparing the works of both artists side-by-side might prove definitely the lack of significant and substantial alterations.³⁴²

Meanwhile, Judge Stein stated that: “*The primary image in both works is the photograph itself. Prince has not materially altered the composition, presentation, scale, colour palette, and media originally used by Graham*”,³⁴³ a fact that led to her decision not to determine about whether Prince’s work demonstrated a new meaning, without the instructions and the opinion of an art expert.³⁴⁴

Furthermore, as far as Prince’s work was insufficient to imbue the original Graham’s work with a different meaning or message, it could not be identified as trans-

³³⁸ *ibid.*, at 7-8.

³³⁹ *ibid.*, at 9-11, 15-16; Lucas, Kate. “Photographer’s Infringement Claims Against Richard Prince Clear Motion-to-Dismiss Hurdle; Two “New Portraits” Lawsuits Will Move On To Discovery”, Grossman LLP, 10 Sept. 2017. (online), Available at: <https://www.grossmanllp.com/infringement-claims-against-prince> (Accessed 16 Jan. 2020)

³⁴⁰ *ibid.* at 12

³⁴¹ *ibid.* at 16-17.

³⁴² *ibid.* at 18-19.

³⁴³ *ibid.*, at 18.

³⁴⁴ *ibid.*, at 19.

³⁴⁴

“Judge Stein said she couldn’t determine whether Prince’s alterations gave a new expression or meaning to Graham’s original without substantially more evidence, such as art criticism and Prince’s own statements of his intention”.

formative to the “reasonable observer” and qualify for fair use. Regarding the character of the use it was evident that as long as Prince’s work displayed in the space of a gallery, it had absolutely commercial features.³⁴⁵ It is worth to mention Prince’s statement regarding to the untouched use of Graham’s work which implied that it corresponded to his primary aim of “New Portraits” series to preach an “ode to social media”.³⁴⁶

At the same time, during the exhibition’s opening, according to the gallery’s bulletin analysis, there was a profound interpretation in Prince’s prints reflecting the disseminating phenomenon of trolling through Internet, challenging simultaneously the realms of ownership.³⁴⁷ The Court observed that the incapacity to determine the transformative use of Prince’s work, could not favor the defendants and “furnish” them with a fair use finding.³⁴⁸

The second fair use factor based on the nature of the copyrighted work was assessed clearly weighting in favor of Graham, as far as “Rastafarian smoking a joint” consisted undoubtedly a creative and published work.³⁴⁹ Further to the four test analysis, the Court tried to penetrate to “the amount and substantiality of the portion used in relation to the copyrighted work as a whole”, concluding that when a secondary work derives from the copyrighted work in its entirety, it advocates against a fair use.³⁵⁰ Under that consideration, due to Prince’s identical verbatim copying of Graham’s work in its size, leaving untouched the aesthetic result of Graham’s work, the defendants could not fall in the acceptance of a fair use finding.³⁵¹

As concerns the fourth factor of the “effect of the use upon the potential market for or value of the copyrighted work”, the Court emphasized on the premise of the

³⁴⁵ *ibid.*, at 20.

³⁴⁶ *ibid.*, at 17; Lee Jane, “Richard Prince Defends His Instagram Reappropriation Art: “Iphone Is My Paintbrush”, Ford Ham 09 Nov. 2018. (online), Available at: <http://www.fordhamiplj.org/2018/11/09/richard-prince-defends-his-instagram-reappropriation-art-iphone-is-my-paintbrush/> [Accessed 16 Jan. 2020].

³⁴⁷ *ibid.* p. 16; Maggie Reinfeld, “Richard Prince, Copyright, and Appropriation Art: A Personal Perspective on Graham v. Prince”, 265 F.Supp.3d 366 (S.D.N.Y. 2017)”, NYU Law, 22 Oct. 2018. [online], Available at: <https://blog.jipiel.law.nyu.edu/2018/10/richard-prince-copyright-and-appropriation-art-a-personal-perspective-on-graham-v-prince-265-f-supp-3d-366-s-d-n-y-2017/> [Accessed 16 Jan. 2020]

³⁴⁸ *supra* 329, at 19-20.

³⁴⁹ *ibid.*, at 21.

³⁵⁰ *ibid.*, at 21-22.

³⁵¹ *ibid.*, at p. 22.

Graham's market usurpation, in the sense of undermining the market of the original work or its potential derivative markets. The Court stated that the more transformative the secondary use, the less substitute role can serve for the original work. Granted that the defendants acknowledged with their pleadings that *"the target market audiences of both artists were the same ("fine art collectors") and the nature of the allegedly infringing content was the same as Graham's original"*, the Court concluded again that the matter was subject to the next stage of litigation.³⁵²

Needless to say that Prince's embroilment in the Instagram copyright infringement case was exemplary of a preliminary ruling.³⁵³ Up to that point of legal process (motion to dismiss stage), the Court limited to the provided facts, formulated its opinion to the lack of fair use principle, stating the claim for Graham's relief.³⁵⁴

Concluding, it is evident that the aforementioned case inflamed the basements of appropriation art, raising again judicial dilemmas of fair use. As far as the "Instagram" case involves many different persons, (apart from Graham), it would be of great significance to be explored the other parties' actions. also Indeed, the result of that controversial case is going to be "full of promise" for the future appropriation artists.

³⁵² *ibid.*, at 22-24.

³⁵³ David Newhoff. "Graham v. Prince or Art v. Fair Use" (17 Oct. 2018) [online], Available at: <https://illusionofmore.com/graham-v-prince-or-art-v-fair-use/> [Accessed 17 Jan. 2020].

Preliminary stage "...as far as the definite determination should be established at the next litigation's stage due to the inadequacy of the parties to provide the appropriate evidence to the Court that would enable it to rule about the transformative use of the secondary work".

³⁵⁴ *supra* note 329, at 32.

V. CONCLUSIONS

To sum up, the paper emphasizes on the review of its primary two-fold goal. On the one hand it summarizes the accomplishment of the author's personal - internal goal and on the other hand it explores the implementation of its broader educational goal orientation. In relation to the first part, I should have to acknowledge that from the very beginning, undertaking the analysis of the subject matter of Appropriation Art, it has been in my mind a huge and deeply interesting intellectual experiment, susceptible to both artistic and legal dimensions. My personal engagement with the visual arts, either as an art lover or as a reader and researcher, boosted my interest to dedicate precious time and energy exploring in an academic level complicated but also intriguing issues. Undoubtedly, the grinding research process made me more competent to map a scope of law embroiled in the field of Arts that broadened my knowledge exceptionally and implanted me with a more critical attitude towards the interrelation between Art and Law. The proliferation of appropriation art under the broader conceptual framework of contemporary art, as it has already been examined, commingles diverse intriguing elements, such as artistic, aesthetic, monetary and the most compelling of all, the legal dimension. The comprehensive analysis of case law on appropriation art based on distinguishing examples of "fair use" activated my skepticism as concerns the challenging and grinding judicial procedure in controversial instances, enriching meaningfully my legal background.

Regarding the second goal, I suppose I contributed to a certain degree and extent to the readers' easier understanding of Appropriation Art and its correlation with the Law, having touched holistically that peculiar genre of Art. The main purpose of that paper was initially to make a contour of the notion of Appropriation Art, tracing back to its roots, as it flourished during the middle of the 19th century in its archetypal forms, capturing the philosophical and theoretical strands which ignited its blossom, drawing simultaneously, in adequacy the features of distinctive appropriation artworks, associated with eminent representative artists. Following that route, potentially, the paper has activated the readers' interest towards a more practical, accessible and "sensory" way of understanding the content of appropriation art. Consequently, the correlation between Appropriation Art and the governing legal instruments, in

combination with exceptional legal cases of copyright infringement, provided the unsuspecting readers with a sharper critical stance against the status that encompasses Appropriation Art and Copyright Law.

After those considerations, the paper is sealed with the acknowledgement that in our age the majority of art production tends to be constantly in the style of appropriation. The encapsulating appropriation art cases have increased dramatically, challenging in diverse ways the litigation. Under these circumstances a modern Copyright legal system should provide more flexible and efficient settlements, in order to insure the balance between contemporary art production and the artist's legitimate interests. The enhancement of the judicial system in cases of infringement in appropriation art should become a priority; a recommendation towards this direction should be the establishment of an ancillary, collaborative body, manned with eminent art experts and art theorists who could impartially facilitate the judicial process evaluating aesthetic and artistic issues. Undoubtedly, the pluralistic, materially educated Judge, even in specific art issues could contribute to an efficient system of just and unbiased opinions correlated with Art.³⁵⁵

³⁵⁵ as the eminent American philosopher and art critic Arthur Danto in his book *"The Transfiguration of the Commonplace"* formulated the philosophical context of Art, highlighting the importance of the historical artistic knowledge as a prerequisite for people to understand and evaluate the ontological substance of Art, he summarized that: *"To see something as art requires something the eye cannot descry - an atmosphere of artistic theory, a knowledge of the history of art: an artworld."* (David E. Cooper, *Aesthetics: The Classic Readings* (Wiley Blackwell, 2019), 338.

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